

THE STATUS OF THE DHIMMĪ IN ISLAMIC LAW

PRESENTED BY

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THESIS SUBMITTED TO  
THE UNIVERSITY OF EDINBURGH  
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

\*\*\* MAY 1988 \*\*\*



IN THE NAME OF GOD THE MOST COMPASSIONATE

THE MOST MERCIFUL

### ACKNOWLEDGEMENTS

I would like to express my profound thankfulness and gratitude to my academic supervisor Dr. I. K. A. Howard, for his learned guidance, help, and encouragement throughout the period of writing this thesis (January, 1985 to May, 1988). Indeed, his advice and criticism have been a great value. However, whatever mistakes, if any, and unanswered questions are attributable to my own understanding of the problem. My thanks should also go to all members of the academic staff of the Department of Islamic and Middle Eastern Studies especially to Miss I. Crawford, the Secretary, for her help and kindness during my academic sojourn in Edinburgh. Deep gratitude should also extended to all my Ph.D. colleagues especially Muḥammad, ‘Alwī, and closest friends in Edinburgh, Glasgow, and the United Kingdom as well as in Malaysia.

I am very grateful to the authorities of the Main Library of Edinburgh University, the Islamic Library of the Department, and particularly the staff of the Inter Library-Loan service for their constant efforts in finding references, without which this thesis might not have been in the present form. I should also record my gratitude to the authorities of Mitchell Library, Glasgow as well as the Main Library of Glasgow University for allowing me to use their

references and facilities.

It must be recorded at this occasion that this study was made possible by the study award granted to me by the newly established International Islamic University, Malaysia, where I have the privilege, initially by secondment from National University of Malaysia, to be among the pioneers of its academic staff. I am very grateful to Professor Dr. Muḥd. Kamāl Ḥasan, Associate Professor Muḥd. Mukhtār Shāfi'ī, and all my academic brethren at the Centre for Fundamental Knowledge, IIU, for their sacrifice, affection, and preference ('ithār), in allowing me a study leave, though their time is so limited, and my presence with them is badly needed, to cope with the growing numbers of students, at the inception of the University, whether in teaching and the like. A debt of gratitude is also owed to the authority and all administrative staffs of IIU.

I owe a great debt of gratitude to Dr. Zainal, Rosmin, Jamīl, Ṭāriq, 'Urwah, Kamaruddīn, Kamīl and Faṭḥī who have helped in the preparation of the scripts and translated some French account.

Last, but not least, I must thank my wife, who is also doing a Ph.D. in Inorganic Chemistry at Glasgow University, for her continuous support, encouragement, and keeping my spirit high, especially during the recent months before the completion of this work when she had to undergo a complicated delivery of our fifth



baby girl, Kawthar. Indeed, being a student, mother, and wife concurrently is not an easy task. She has therefore demonstrated an excellent quality of wife and motherhood. I also thank all my children, who though still young, understand and appreciate the nature of my work.

To Miss Z. Abdullah, who from the outset of this work, took trouble but dedicated and patient in looking after the children and doing some household works. May God bless and reward her with best reward. However, all rewards, which may arise from this humble work, should go to my parents who, during their lives, have always encouraged me to pursue higher knowledge and truth of which this is a partial reflection.

Finally, the Islamic ethics requires that whenever a writer would end up his preface and acknowledgement, he would recite a maxim, as the classical jurists and scholars have been properly followed in their written academic works: What is true and right are from God; while the mistakes and errors are entirely mine. For He is the source of knowledge. He knows best what is right and wrong. All gratitude and praise be only to Him.

‘Abd al-Raḥmān Awang

Kelvinside, Glasgow.

Wednesday, 18th Ramaḍān, 1408.

4th May, 1988.

CONTENTS

	<u>Page</u>
Acknowledgments	i
Contents	iv
Abstract	ix
Transliteration	xi
A Note	xi
 <u>INTRODUCTION</u>	 xii
I. The Purpose of the Inquiry	xii
II. The Scope of This Study	xiii
III. A Brief Survey of the Sources	xv
 <u>CHAPTER ONE</u>	 1
<u>The Islamic Conception of the World</u>	1
I. <u>Dār al-Islām</u>	2
II. <u>Dār al-Harb</u>	7
III. <u>Dār al-‘Ahd</u>	11
IV. The Nature of Relationship between Islamic and non-Islamic states	16
V. <u>Al-‘Aqīdah</u> as a Basis for Division of Mankind	23
VI. Categories of non-Muslims	24
A. <u>Ahl al-dhimmah</u> (Protected People)	25
B. Other Categories of non-Muslims	28
 <u>CHAPTER TWO</u>	 30
<u>Dhimmī's Obligations</u>	30
I. <u>Jizyah</u> (Protection Tax)	30
A. Basic Notion of <u>Jizyah</u>	30
B. Who Pays <u>Jizyah</u>	39
C. The Amount to be Charged	42
D. The <u>Jizyah</u> Is Not a Punishment	44
E. The Case of Banū Taghlib	45
H. Cases Where <u>Jizyah</u> is Exempted	48
1. Converts and Death	49
2. Lapse of Time	52
3. Withdrawal of Protection	54

4. <u>Military Service as an Alternative to Jizyah</u>	55
G. <u>Jizyah</u> Is Not a Poll-Tax	58
H. <u>Jizyah</u> Is Not a Fundamental Law	61
I. <u>Jizyah</u> in the Contemporary Muslim Countries	63
J. Some Examples of Treaties	65
II. <u>Kharāj</u> (Land Tax)	72
A. Basic Notion of <u>Kharāj</u>	72
B. The Genesis of <u>Kharāj</u>	73
C. Legal Basis of <u>Kharāj</u>	77
1. Public Interests ( <u>maṣlahah</u> )	77 —
2. Consensus ( <u>ijmāʿ</u> )	83
D. Classification of Lands in Respect of <u>Kharāj</u>	87
E. Category of <u>Kharāj</u>	90
1. <u>Kharāj Wazīfah</u> ( <u>Kharāj</u> on Land and Produce)	90
2. <u>Kharāj al-Muqāsamah</u> (the Proportionate <u>Kharāj</u> )	91
F. Is the Rate of <u>Kharāj</u> Changeable	91
G. Conversion and <u>Kharāj</u>	93
H. Expenditure of <u>Kharāj</u> Revenues	97
I. Purchasing of <u>Kharāj</u> Land	99
III. <u>ʿUshr</u> (Tithe)	100
A. Basic Notion of <u>ʿUshr</u>	100
B. The Legitimacy of <u>ʿUshr</u>	101
IV. Observance of Some Aspects of Islamic law	104
 CHAPTER THREE	 110
<u>The Islamic Attitude towards non-Muslims</u>	110
I. Basic notion of Tolerance	110
II. Some Principles of Tolerance	111
III. Aspects of Tolerance	119
IV. Some Archetypes of Muslim Tolerance	127

<u>CHAPTER FOUR</u>	136
<u>The Dhimmī's Judicial Status</u>	136
I. Criminal Law	136 —
A. Is Islamic law a Universal or a Territorial Law	137
1. The First Theory	138
2. The Second Theory	142
3. The Third Theory	144
B. Islamic Criminal Law Is a Branch of Public Law	145
C. Classification of Crimes	149
1. Crimes of <u>Hudūd</u> (A Fixed Punishment)	149
2. Crimes of <u>Qisās</u> (Retaliation) and <u>Diyah</u> (Blood Money)	149
3. Crimes of <u>Ta'zīr</u> (Discretionary Punishment)	150
D. Crimes Against the State	151
1. Armed Robbery	152
a. Punishment for Armed Robbery	155
b. Punishment for non-Muslims and its Implications	158
2. Rebellion ( <u>al-Baghy</u> )	160
a. The Punishment for <u>Bughāt</u>	162
b. Punishment for non-Muslims	163
3. Espionage Crime ( <u>Tajassus</u> )	166
a. Punishment for non-Muslims	168
E. Crimes Against Individual	170
1. Historical Background	170
2. The Law of Homicide	173
3. The Power to Carry Out the Execution of <u>Qisās</u>	176
4. Some Disputed Points	179
a. <u>Qisās</u> Against a Muslim for Killing a non-Muslim	179
5. <u>Qisās</u> for Killing a <u>Musta'min</u>	185
6. <u>Qisās</u> Against <u>Dhimmī</u>	187



F. Unlawful Intercourse ( <u>al-Zinā</u> )	190
1. The Punishment of <u>Zinā</u>	191
2. The Punishment for a <u>Dhimmī</u>	194
3. The Punishment for a <u>Musta'min</u>	196
G. Punishment of Rape	198
H. The Punishment for Homosexuality and Similar Cases	200 —
I. False Accusation of Unchastity ( <u>al-Qadhf</u> )	203
1. The Punishment for <u>Dhimmī</u>	206
2. Effect on <u>Dhimmī</u> 's Testimony	207
3. The Punishment for a Muslim Who Accused a non-Muslim	208
J. The Crime of Theft ( <u>al-Sariqah</u> )	209
1. Some Disputed Points on the Punishment	210
2. The Punishment of <u>Dhimmī</u> for Theft	213
3. The Punishment of Muslim Who Steals from non-Muslim	216
II. Family Laws	219
A. Marriage to non-Muslims	219
B. Marriage Among non-Muslims	220
C. The Effect of Conversion on non-Muslims Marriage	225
1. In <u>Dār al-Islām</u>	225
2. Difference of Domicile ( <u>Ikhtilāf al-Dār</u> )	232
D. Maintenance ( <u>Nafaqah</u> )	238
1. Maintenance for non-Muslim Wife	238
2. Maintenance among non-Muslims	240
3. Maintenance in the Case of Conversion	241
E. Inheritance ( <u>mirāth</u> )	242
1. Inheritance between Muslim and non-Muslim	243
2. Inheritance in the Case of Conversion	246
F. Endowment ( <u>waqf</u> )	248
1. The Endowment of non-Muslims	249
2. Endowment for non-Muslims	251



G. Witness ( <u>Shahādah</u> )	254
1. Witness of non-Muslim	254
2. Non-Muslim Witness on Muslim Marriage	258
3. Witness Among non-Muslims	258
III. The Law of Contracts and Obligations	261
A. In <u>Dār al-Islām</u>	261
1. Some Exceptional Cases	265
a. Liquor and Pigs	265
b. Vandalism to Liquor and Pigs	267
c. Employment Relationship	268
d. Business Partnership	269
e. Representation or Agency ( <u>wikālah</u> )	271
B. In <u>Dār al-Harb</u>	271
1. The First Theory	272
2. The Second Theory	273
 <u>CHAPTER FIVE</u>	 275
<u>Dhimmī's Religio-Socio-Political Status</u>	275
I. Religion	276
A. The Basis of Religious Freedom	280
B. Places of Worship	285
II. Politics	293
A. Holding Public Office	294
B. Election	303
III. Education	306
IV. Economics	310
V. Social Security	313
 <u>CHAPTER SIX</u>	 321
<u>CONCLUSION</u>	321
LIST OF ABBREVIATIONS	333
NOTES	338
<u>BIBLIOGRAPHY</u>	393

### ABSTRACT

This study concerns mainly with the status and position of dhimmī in various aspects of Islamic law. It is an attempt to survey the legal status of dhimmī in the scattered writings of Muslim jurists, and tie them up systematically in a one work.

The Introduction deals with the purpose of the inquiry, the scope, and the relevant literature of the thesis.

In Chapter One the Muslim conception of the world, or Islamic law of nations; viz. dār al-Islām, dār al-harb, dār al-‘ahd, is analysed as is the nature of the relationship among those states, and category of non-Muslims.

Chapter Two is devoted to the dhimmī's obligations pertaining to the fundamental concepts of jizyah, kharāj, ‘ushr, and their need to observe some aspects of Islamic law.

Chapter Three is concerned with the principles and aspects of the Islamic conception of tolerance towards non-Muslims as well as some archetypes of Muslim tolerance.

Chapter Four gives a detailed discussion of the dhimmī's judicial status in Islamic criminal and family laws, and the law of contracts.

Chapter Five is concerned mainly with the analysis of dhimmī's religio-socio-political status. The question of religious autonomy, political rights, economic, education, welfare etc. will be discussed.

Finally, Chapter Six outlines the result of this study.

## TRANSLITERATION

I have followed the transliteration system of the United States Library of Congress as outlined in the Cataloguing Service Bulletin 49 (November, 1958), with this exception:

I have transliterated "Ä" as "h". For instance, ummah NOT umma, Abū Ḥanīfah NOT Abū Ḥanīfa. However, all well known place names have been transliterated according to their usual form in English such as Mecca and Medina NOT Makkah and Madīnah.

## A NOTE

The expression rendered in English "peace be with him" after mentioning the Prophet Muḥammad and the other Prophets, and "God be pleased with them" and "God have mercy on them" in respect of the Companions, Successors and eminent personalities in Islam, are not to be found in the main text of this thesis. These expressions should be understood by all Muslims whenever such people are mentioned.



## INTRODUCTION

### I. The Purpose of the Inquiry

This study seeks to analyse the rights, position, and above all, legal status of a dhimmī in all aspects of Islamic law as perceived and discussed by the jurists and scholars of Islam. This is, of course, a vast subject and its material is scattered in the writings of the early Muslim jurists, exegetes, historians and the like. The subject per se has never been dealt separately, in its own context, by those writers, in their writings, except by a few later jurists as will be seen. This is, perhaps, because the subject may have been not important enough, in their times, for them to undertake a separate study; and because it was sufficient to mention the subject here and there during the discussion of other subjects. Hence, the task of the writer, in this regard, is not only to identify the relevant sources and topics within these sources pertaining to the dhimmī, but also to collect the material, from a large corpus of sources, and put it together in a one place, so that it becomes one body of rules, in a coherent form.

It seems that this subject is becoming more relevant in our times especially after the emergence of Islamic movements in many parts of the Muslim world. The objective of these movements, inter alia,



is to establish the Islamic state, with all its institutions, including the law. The position of the dhimmī, however, is crucial under these circumstances. It is therefore pertinent to examine the dhimmī's legal status as perceived by the Muslim jurists and scholars to enable us to understand the normative framework of dhimmī's position in Islamic law.

## II. The Scope of This Study

Since the area of this subject covers a wide variety of disciplines in Islamic studies, this study will be limited to the dhimmī's position in Islamic law. In so doing, the views of the four major schools of Islamic law, viz. Mālikī, Ḥanafī, Shāfi'ī, and Ḥanbalī will be the main basis of this study. The different views of these schools will be assessed in accordance with the relevant evidences used to support their position and the exigencies of the times.

However, for the purpose of comparison and to give more scope for discussion, the views of other schools such as Zāhirī, Jā'farī, and Zaydī will also be touched on briefly from time to time where it seems appropriate. In addition, the views of early individual (independent) jurists such as Zuhri of Ḥijāz (d. 124/742), Ibn Abī Laylā of Kūfah (d. 148/765), Awzā'ī of Syria (d. 157/774), and Sufyān al-Thawrī of Kūfah (d. 161/778) will also be mentioned,

from time to time, in order to throw more light on the issue. Although some of the views which were expressed in the early period of Islam, might need to be reexamined in the light of the present situation, those views and the discussion therein are still relevant and worth studying. For instance, the concept of jurisdiction, difference of domicile (ikhtilāf al-dār), conversion during one's marriage, are real legal issues, and some opinions expressed by those jurists are still relevant in our time.

This study covers no specific period of time. This is due to its very nature. For, the prolific yet scattered writings of the jurists on the subject, stretch from the inception of Islamic intellectual milieu until about seventh and eighth centuries A.H. when the period of decadence began and the so called the closure of the gate of ijtihad prevailed. However, most of the subject-matter analysed in this thesis is mainly from the work of early jurists except in Chapter Five where many of the issues are relatively recent in nature. Hence the material used in that Chapter is from fairly late and modern works.

Although this inquiry is primarily concerned with the legal aspects of the dhimmī, the literature of the Qur'ān and its exegesis, al-sīrah (the biography of the Prophet), his Traditions, the practices of the Four Guided Caliphs as well as the Companions of the

Prophet, their military expeditions and treaties, biographies and annals will also be examined. For those accounts are indispensable for the understanding and comprehension of the subject in its totality. The subject is so interrelated with different disciplines that these cannot be ignored.

However, this study does not regard the Constitution of Medina as a document concerned with dhimmis because the document was drafted and ratified prior to the revelation of the verse of jizyah (9:29), therefore that agreement, between the Prophet and non-Muslims in Medina, was not based on 'aqd al-dhimma (pledge of allegiance). However, mention of it will be made in relationship to some other treaties concluded, which are based on jizyah.

The study also does not cover the so called "the Pact of 'Umar" or shur'at 'Umar or 'Ahd 'Umar which was attributed to 'Umar I. For, the pact has not been accepted by the jurists hence they hardly discussed it.

### III. A Brief Survey of the Sources

#### A. Islamic Sources

The main sources of information on the subjects, of course, can be derived from, in general, the well known materials of Islamic fiqh. Therefore, the primary works of all major schools of Islamic law or the book of Islamic jurisprudence (fiqh) will be the primary sources of information and form the basis of



analysis to the problems and issues in question.

### 1. The Works of Fiqh

The books of fiqh or text books of Islamic law reflect the points of view of the fuqāhā' (jurists). Each author writes in accordance with the stand point of his school on each issue but the view of other schools are also recorded for the purpose of comparison. They not only contain information on matters of law, but are also rich in all sorts of information including historical, philological, biographical, theological and the like. They provide a normative framework for the dhimmīs according to Islamic law, not how they were actually treated by Muslim rulers whether fair or otherwise.

These general legal works include:

al-Mudawwanah al-Kubrā by Mālik b. Anas (d. 179 A. H. /795 A. D. ), al-Radd 'alā Siyar al-Awzā'ī by Abū Yūsuf (d. 182/798), Kitāb al-Umm by al-Shāfi'ī (d. 204/819), Kitāb Ikhtilāf al-Fuqahā' by al-Ṭabarī (d. 310/923), Aḥkām al-Sultāniyyah by al-Māwardī (d. 450 A. H. ), al-Muḥallā by Ibn Ḥazm (d. 456/1065) Aḥkām Al-Sultāniyyah by al-Farrā' (d. 458 A. H. ), Sharḥ al-Siyar al-Kabīr by al-Sarakhsī (d. 483 A. H. ), idem, al-Mabsūṭ, Badā'ī' al-Ṣanā'ī' fī Tartīb al-Sharā'ī' by al-Kāsānī (d. 587 A. H. ) and al-Mughnī by Ibn Qūdāmah (d. 620/1223).

Perhaps the earliest monograph on the subject is

the one written by Ibn Qayyim al-Jawziyyah (d. 751/1350), a Hanbalī jurist, entitled: Aḥkām Ahl al-Dhimmah. It was edited with commentary by the late Ṣubḥī al-Ṣālih and first published in Beirut in 1961. It was not uncommon for the classical jurist to write a book in response to a question forwarded to him. This was also the case of the book.

Since the author directly dealt with the subject, it covers most of the topics pertaining to the dhimmī such as jizyah, kharāj, ʿushr as well as many aspects of law and social relationship between Muslim and non-Muslims. In short, the work is <sup>an</sup> invaluable reference on the subject.

There are several modern works on the subject. For example, al-Tashrīʿ al-Islāmī li Ghayr al-Muslimin, by al-Marāghī, Cairo, n.d. This book gives some account on the status of dhimmī in Islamic law, the treatment by the four Guided Caliphs and some treaties with non-Muslims. Since the author treats the issues briefly it lacks clarity and at some points it needs further clarification. Nonetheless, it is a useful reference for understanding the concept of dhimmī and its related subject.

Another treatise on the subject is, Irshād al-Ummah ilā Aḥkām al-Hukm bayn Ahl-Dhimmah, by Muḥammad Bakhiat, a former muftī of Egypt, Cairo, 1349 A.D. (32 pp.). That treatise is too short to handle such a big



subject.

More recently, Aḥkām al-Dhimmiyyīn wa al-Musta'minīn fī Dār al-Islām, by 'Abd al-Karīm Zaydān, Baghdad, 1976 (630 pp.). The work was originally a Ph.D. thesis submitted to the Faculty of Law, Cairo University, 1962. It is a comprehensive work on the subject with detailed notes and explanation of each concept. Indeed, it is <sup>an</sup> invaluable and indispensable reference on the subject.

Another book is al-ʿAlāqāt al-Ijtimāʿiyyah bayn al-Muslimīn wa Ghayr al-Muslimīn, by Badrān Abū al-ʿAynayn Badrān, Alexandria, 1968. The book treats the rules of social relations between Muslims and non-Muslims, but it does not cover all aspects of the problem. Al-Islām wa Ahl al-Dhimma, by ʿAlī Ḥusnī al-Kharbuṭlī, Cairo, 1969, is another work dealing with the subject. But the book mainly treats historical accounts and <sup>the</sup> social life of the dhimmī under Islam. It also gives some accounts of tolerance towards non-Muslims.

Finally, Yūsuf al-Qaraḍāwī published his work Ghayr al-Muslimīn fī al-Mujtamaʿ al-Islāmī, 2nd ed. Beirut, 1983. The work has been translated into English, and some other Muslim languages, by Khalil Muhammad Hamad et al., Indianapolis, 1985, entitled: Non-Muslims in the Islamic Society. Although the book is brief and small in size (77 pp.), it is a useful

reference on the subject and the author has made a useful contribution to the field.

## 2. Early Works on Kharāj

The works on kharāj not only deal with the land tax, but also provide a number of accounts on the subject <sup>of taxation</sup> as a whole. The authors usually employ the method of isnād as was customary with many classical works. Amongst these works are: Kitāb al-Kharāj by Abū Yūsuf, Kitāb al-Kharāj by Yaḥyā b. Ādam (d. 203/818), Kitāb al-Amwāl by Abū ‘Ubayd (d. 224/838), Kitāb al-Kharāj by Qudāmah b. Jaa‘far (d. 320/932), and al-Istikhrāj li Ahkām al-Kharāj by Ibn Rajab al-Ḥanbalī (d. 795 A. H.).

The first and the second of these books employ the same narrators and provide almost similar accounts, whilst the third is the main source of the fourth.

3. In addition, the works of early exegetes such as Ahkām al-Qur’ān by al-Shāfi‘ī, Tafsīr by Tabarī, Ahkām al-Qur’ān by Jaṣṣāṣ (d. 370 A. H.), Tafsīr al-Kashshāf by Zamakhsharī, (d. 528 A. H.) and al-Jamī‘ li Ahkām al-Qur’ān by Qurtubī (d. 671 A. H.) are also consulted in order to serve as supporting evidence for each case and compared with the understanding of the jurists.

4. The same applies to the book of Traditions of the Prophet. Since the jurists frequently quoted Tradition to support their views on every case, resort

to the books of Tradition is indispensable in order to ascertain their validity and applicability to the case in point. Amongst the frequently consulted book of Traditions are: al-Muwatta by Mālik b. Anas, al-Muṣannaf by al-Ṣanʿānī (d. 211 A.H.), al-Musnad by Aḥmad b. Ḥanbal (d. 241/855), Ṣaḥīḥ Bukhārī by Bukhārī (d. 256/869), Ṣaḥīḥ Muslim by Muslim (d. 261/874), and Sunan by Abū Dāʿūd (d. 275/888).

5. The books of annals, Islamic history and the biography of the Prophet are also frequently consulted as are the accounts on treaties, important events and incidents. Amongst those books are: The Life of Muḥammad by Ibn Ishāq (d. 152/768), al-Sīrah al-Nabawiyyah by Ibn Hishām (d. 218/883), Futūḥ al-Buldān by al-Balādhurī (d. 279/892), and Tārīkh al-Umam wa al-Mulūk by al-Ṭabarī.

#### B. Western Sources

Perhaps one of the earliest works in English on the subject is The Caliphs and Their non-Muslim Subjects : A Critical Study of the Covenant of ʿUmar by A.S. Tritton, first published in London, 1930. The book has been translated to Arabic by Ḥasan Ḥabshī entitled: Ahl al-Dhimmaḥ fī al-Islām and first appeared in Cairo, 1949. The treatise gives some accounts of the dhimmī's social condition under Muslim rulers. The legal position of dhimmī is hardly



discussed except incidentally. It is a descriptive or rather anecdotal account of <sup>the</sup> dhimmī's social condition under Muslim rulers.

There are two related studies but both only treated the subject partially, namely jizyah, kharāj and some related forms of taxation. They are Islamic Taxation in the Classic Period by F. Lokkegaard, Copenhagen, 1950, and Conversion and the Poll Tax in Early Islam by D.C. Dennett, Cambridge, Mass., 1950.

Arnold's work The Preaching of Islam, first appeared in London, 1896, gives some account of the dhimmī's life and condition under Islam. Some expose of Muslim treatment and tolerance towards non-Muslims seem to be well documented. Though the book was not directly involved on the subject it is a useful reference and informative.

Similar account can be found in The Muslim Conduct of State by M. Hamidullah, first published in Hyderabad-Deccan, 1941-42. The first partial German edition appeared in Bonn, 1935. The treatise deals mainly with the Islamic law of nations. Since the subject of <sup>the</sup> dhimmī was always dealt by the jurists during their discussion of al-siyar and the like, the author follows the same method. The book seems to be well researched by providing many primary sources. It is indispensable for the subject.

Fattal in his work Le Statut Légal Des Non-Musulmans En Pays D'Islam, Beirut, 1958, is one of few European works on the subject and it is a fairly useful account.

Bat Ye'or in her work The Dhimmī: Jews and Christians under Islam, was originally published in French as Le Dhimmī, Paris, 1980. The work has been translated into English by David Maisel et al., New Jersey, 1985. The book provides a considerable account on the subject. Again it mainly concentrates on the social condition, as many other authors do, of the dhimmī stretching from the classical period to the modern time. It covers the areas from Palestine to Muslim Spain. Even the concept of jihād against Israel is discussed in the book. Such a wide coverage not only reduces the quality of the work, but also involves it in a large amount of unnecessary detail.

Bernard Lewis in his Islam: From the Prophet Muhammad to the Capture of Constantinople, ed. and trans. London, 1974, devotes one section for the status of non-Muslims. The section mainly contains a translation of classical Arabic texts.

Unlike some previous works, Non-Muslims under Sharī'ah by 'Abdur Raḥmān I. Doi, first published in The United States, in 1979, is an interesting modern work on the subject. For it provides a considerable account of <sup>the</sup> legal aspects and rights of the dhimmī.



It is a useful reference for a basic understanding  
of the subject.

## CHAPTER ONE

### The Islamic Conception of the World

Any discussion of the concept of dhimmīs will involve some aspects of the Islamic law of nations. Since dhimmīs constitute a part of the community (ummah), or rather a state in the modern sense of the term, the relationship between a dhimmī and the state is naturally governed by Islamic private international law. The Muslim jurists, however, usually discuss this subject, in their writings under the topic of al-siyār or under the Book of al-jihād.

Since the area of investigation falls under the above mentioned topics (in the Islamic books of jurisprudence- fiqh), at times, we find that many of its rulings were a product of jurists as well as of those in authority according to the exigencies of the moment. For this reason, the subject of our investigation usually falls within the domain of al-siyāsah al-shar‘iyyah (Islamic polity), another branch of Islamic studies.

According to Muslim jurists the world at large can be divided, theoretically, into two distinct categories, i. e. dār al-Islām (the abode of Islam or the Islamic state) and dār al-ḥarb (the abode of war or the enemy state). Some jurists, particularly,

al-Shāfi'ī (d. 204 A.H. /820A.D), introduced another category that is dār al-‘ahd (territory of covenant).<sup>1</sup>

#### I. Dār al-Islām (abode of Islam)

Dār al-Islām<sup>2</sup> can be defined as the territory wherein Islamic law is enforced by a Muslim authority or the whole territory wherein the law of Islam prevails. Its unity resides in the community of the faith, the unity of the law, and the guarantees assured to members of the ummah.<sup>3</sup> Its inhabitants are, broadly speaking, Muslims and non-Muslims who enjoy full protection as to their lives, property, and religious freedom, subject to certain restrictions imposed by the State. Since the law of the land is the Islamic law proper, administered by the Muslim authority, it therefore follows that every ordinance, institution and socio-political system therein should be in line with the general rules of Islamic teachings. Perhaps an equally significant corollary is the adoption of the principle of Islamic tolerance to the inhabitants of the state belonging to different religions. The principle is vividly seen in most major sources of Islamic law.<sup>4</sup>

In early Islam, the territory of dār al-Islām, with respect to the modes of acquisition, has three different categories:<sup>5</sup>

A. Those which have been taken by force of arms

(‘anwatan);

B. Those which have been taken without fighting after the flight of their previous owners; and

C. Those which have been acquired by treaty (sulh).

This third category can be divided again into two, according to the original title of the property/land, namely,

1. Those vested in the Muslim community as waqf. In this case the former owners, in fact, can remain on their land; they pay kharāj<sup>6</sup> and their country becomes dār al-Islām. Hence, the title to the land can neither be alienated nor leased. As to the question of jizyah, al-Māwardī said that they can pay it if they wish for an unspecified period of times, but the Muslim authority, however, can by no means force them to pay it since they are ahl al-‘ahd (people of the truce) not dhimmīs;

2. In this case the treaty is concluded on the terms that the original owners keep their estates and pay kharāj from its revenues. This kharāj is regarded as a jizyah and they continue to pay it so long as they do not embrace Islam. Thus, their country is considered neither as dār al-Islām nor dār al-ḥarb but as dār al-ṣulh or dār al-‘ahd. Their estates, however, can always be alienated or leased by them, for the title is absolutely theirs. Hence, the Muslim



authority can not impose a jizyah on them as they are not part of dār al-Islām.<sup>7</sup>

According to Abū Ḥanīfah (d. 150 A.H. / 767 A.D.)<sup>8</sup> dār al-Islām may lose its de jure status as dār al-Islām subject to three conditions :

a. That the laws and regulations of non-Muslims be enforced therein;

b. That it should be surrounded by other countries meeting the description of dār al-ḥarb without any country of the description of dār al-Islām being contiguous to it; and

c. No Muslim or dhimmī, that is, a non-Muslim subject of the Islamic state, be permitted to live there, in the same security and harmony as under the previous Muslim government. But two of Abū Ḥanīfah's great followers, Abū Yūsuf (d. 182 A.H. / 798 A.D.) and Muḥammad al-Shaybānī (d. 189 A.H. / 805 A.D.), the former being a jurist, practising lawyer, and a Chief qāḍī, maintained that once the law of non-Muslims was enforced rather than al-sharī'ah, the country was no longer considered as dār al-Islām.<sup>9</sup> For Abū Ḥanīfah's followers then the test of dār al-Islām is whether al-sharī'ah is fully enforced or another body of law is in operation. It would appear appropriate to consider any dār (territory), whether Islamic or otherwise, basically from the supremacy of the law over that territory, i.e. if the sharī'ah<sup>10</sup> is enforced and

supersedes other forms of laws, the territory in question is dār al-Islām (The Islamic state); conversely, if foreign law is applicable, though administered by the Muslim judges, the territory ceases to be dār al-Islām.

In addition, another test to this effect in Muslim political theory is that a territory becomes dār al-Islām or otherwise depending on the sovereignty over that territory. If it belongs to the Muslims and they apply the Islamic system, the territory is both de facto and de jure dār al-Islām and vice versa.<sup>11</sup> The test is therefore on the question of the sovereignty over the territory and to what extent the Muslim community observes Islamic principles.

It is worth mentioning here that the Muslim jurists consider all Muslim territories or countries as one dār regardless of boundaries or the existence of one or more rulers. For, in theory, those territories are not recognised as separate entities and should be governed by one uniform constitution derived from the Qur'ān and sunnah. Any law and regulation must be based on, and enacted in conjunction with those two primary sources. It follows that the Islamic law, legally speaking, binds individuals with respect to the Muslim community (ummah) they belong to, not the territory they live in. Hence, Muslims are obliged to observe

the Islamic injunctions to their utmost no matter where they reside. Any infringement of the said law would effect his credibility as a Muslim and would be liable to be punished either in this world or by God in the Hereafter. For the Muslim should, at all times, at any place, observe and uphold the Islamic teachings both in his deeds and character.

It should be noted that in many contemporary Muslim countries, the authority is in the hands of Muslim rulers, but the system of government, the laws and almost the whole socio-economic system are incompatible with the Islamic teachings. The prevailing situation entails consideration of the legal question as to whether or not those countries could be legally considered as dār al-Islām. This state of affairs has motivated many Muslim scholars, headed by Muslim jurists, to appeal to the Muslim public as well as to those in power that the system should take the sharī'ah as its source.<sup>12</sup> This urgent need for change is manifested in the emergence of many Islamic movements in many parts of the Muslim world beginning in the late forties.<sup>13</sup>

Finally, there is no provision in the Qur'ān that divides the world into two categories as has been discussed above. The Qur'ān does, on several occasions, mention nations and tribes and it encourages the Muslims to spread the word of God all



over the earth.<sup>14</sup> The ḥadīth, however, that is, the Prophetic Traditions, traces the idea of dār al-ḥarb back to the Medina period. There are several Traditions which report that the Prophet himself sent letters as well as messengers to princes, Caesar, the people of Yamāmah etc. inviting them to accept Islam as their religion.<sup>15</sup>

## II. Dār al-ḥarb (Abode of War/ Enemy Territory)

Dār al-ḥarb is a territory or a land inhabited and controlled by non-Muslims. The authority as well as the law of non-Muslims are enforced therein. There is no relationship or bilateral agreement between dār al-Islām and dār al-ḥarb but rather a state of animosity prevails. Thus, dār al-ḥarb includes those countries where Islamic law is not enforced,<sup>16</sup> the authority is not in the hands of Muslims, and finally peace has not been proclaimed between Muslims and non-Muslim authorities.

As has been mentioned earlier a twofold division of the world was formulated by the jurists as a result of the concept of jihād in Islam.<sup>17</sup> Therefore, the status of territory in question or al-dār could be transformed from al-Islām to al-ḥarb or vice versa according to the manner by which that particular territory was acquired. If it was conquered (al-fath)<sup>18</sup> by force the territory became parts of dār



al-Islām; conversely, if it ended up with a peaceful agreement the territory became dār al-‘ahd. On the other hand, if for instance, a territory of dār al-Islām was occupied by non-Muslims forces, it immediately becomes dār al-ḥarb, provided that (a) the law of unbelievers replaces that of Islam; (b) the territory in question directly adjoins dār al-ḥarb; and (c) the inhabitants therein no longer enjoy peace and security as they had under the Muslim authority.<sup>19</sup>

The traditional example of dār al-ḥarb according to Muslim jurists was Mecca after the migration of the Prophet and his Companions whereas Medina was the first dār al-Islām.<sup>20</sup> It follows that the whole raison d'être of dār al-Islām is to achieve the sovereignty and execution of God's Will on earth. It is for this reason that Islam is reluctant to recognize the diversity of the world, the plurality of laws, in its ipso iure; for the existence of different forms of governments and systems of laws is immaterial to Islam. They are, <sup>the</sup> from an Islamic legal point of view, contradictory to the law of God—the Islamic law—because all other laws are of human origin and belong therefore to the category of regulations or government orders, or to be exact what the majority wants, emanating from temporary authority and subject to space-time limitation. Nevertheless Islam admits, at least, ipso

facto the existence of one form of nation or another.

This is suggested by al-Qur'ān itself when we read:

"...because of a nation being more numerous than  
(another) nation...."<sup>21</sup>

This verse suggests the existence of non-Muslim entities which have their own systems and authorities. In the next verse of the same sūrah we read: "Had Allah willed He could have made you (all) one nation, but He sendeth whom He will astray and guideth whom He will, and ye will indeed be asked of what ye used to do."

At all events, Islam urges Muslims to spread the message all over the world and it is incumbent upon Muslims to establish a community or a state as a means to carry out both religious and temporal affairs according to the Islamic system.<sup>22</sup> Therefore, unlike other religions, Islam considers its relationship with a state as inseparable and interdependent.

However that may be, some writers object to the two fold division of the world or even the tripartite division, which include dār al-‘ahd, arguing that that division was the innovation of the ‘Abbāsīd jurists in order to distinguish, in the time of actual war, between Muslim and non-Muslim states. Therefore they reject the inclusion of that division in the principles of Muslim legal theory.<sup>23</sup> But if the division were to be excluded from the principles of

Muslim legal theory there would not exist a division of non-Muslims into harbī, musta'min etc. No authority can be found who rejects those categories of non-Muslims. Despite the Islamic view that the origins <sup>the</sup> of Islamic legal system were divine and revealed in nature, since God is the sole legislator in Islam, the Muslim jurists have played an important part in interpreting and developing the principles of that revealed law into various forms of human activity. It would seem, therefore that this division is indispensable both in the time of actual war or peace in order to identify the status of the opposite party. Thus, the division is a matter of practical rather than theoretical need. The Qur'ān implicitly admits that division when we read :

"O mankind! Lo! We have created you male and female, and have made you nations and tribes that ye may know one another...."<sup>24</sup>

In later times for various reasons, the division of the world into dār al-Islām and dār al-harb became almost insignificant. But it never entirely disappeared. Its concept remained to be seen and it was always possible, from the Muslim point of view, to reactivate it as indeed happened from time to time. It follows that harbī, the subjects of dār al-harb, could also be redefined according to the rules of al-siyāsah al-shar'īyyah.



### III. Dār al-‘Ahd (Territory of the Covenant)

A third category of the dār according to Muslim constitutional law is dār al-‘ahd. This category of land was introduced by al-Shāfi‘ī<sup>25</sup> for that land which was considered neither as dār al-Islām nor dār al-ḥarb but rather a truce or a covenant had been concluded between Muslim and non-Muslim authorities. This territory was alternatively called dār al-ṣulḥ<sup>26</sup> (territory of peace) to signify non-Muslim territories which were involved in a treaty agreement with dār al-Islām. The term ṣulḥan indicates peace agreement as opposed to ‘anwatan which means acquired by force.

Under this agreement, the non-Muslims agree to pay kharāj or land tax to the Muslim sovereign and the latter guarantees their security as to their life, property and religion from internal intervention and external attacks. Furthermore, by no means can Muslims authority impose jizyah on them since they are not living under the jurisdiction of dār al-Islām,<sup>27</sup> for in order to collect jizyah the Muslims had to occupy the land by force or there was an agreement to that effect but that was not the case of dār al-ṣulḥ because the inhabitants had proclaimed treaty relationship with dār al-Islām. The Muslims henceforth could not attack them nor could they impose any extra burden on a mu‘āhid. It has often been presumed a priori that the relationship between the two



contracting parties is governed by the provisos of their agreement. It would appear that the mu'āhids could still maintain their laws, religions, customs and general practices. No colonization by Muslims was permitted there, and no interference by Muslim officials in their internal affairs. But in any event, in spite of maintaining its independence and entity, dār al-ʿahd could not be considered, from the constitutional point of view, as a full sovereign independent entity (state).<sup>28</sup> This is because of the existence of the bilateral agreement that puts it in a tributary relationship with the Islamic state. For this reason, some Muslim jurists incline to consider it as a temporary and therefore intermediate territory between dār al-Islām and dār al-ḥarb.

On the other hand, Abu Ḥanīfah, the founder of the Hanafi school, and some other jurists, do not agree with al-Shāfiʿī. Instead they maintain that such a territory can be considered only as part of dār al-Islām and there can be no territory other than that defined by the twofold division of the world as has previously been discussed. Some jurists, however, held that this was, in fact, not a question of ṣulḥ or ʿahd but merely of an armed truce of armistice (hudnah) and the implementation of some reciprocal undertakings. This opinion apparently is held by those who are not prepared to accept a non-status territory, i.e.

neither Islam nor ḥarb and its implications.

While some Ḥanbalite jurists<sup>29</sup> agree with al-Shāfi‘ī, the majority of Muslim jurists do not accept dār al-‘ahd as a separate entity outside the realm of Islam. The majority argue that since the people in such a land have concluded a peace agreement (ṣulḥ) they should be considered as ahl al-dhimmah (protected people) and liable for jizyah. Their land therefore should be included under the domain of dār al-Islām.<sup>30</sup>

The two historical examples of such cases which apparently give rise to the whole concept of al-ṣulḥ were Najrān and Nubia. The Prophet himself concluded a treaty with the Christians of Najran guaranteeing them security, as to their life, property and religion, and levying on them a certain tribute as a token of protection. This tribute is regarded by some hitherto as kharāj and by others as jizyah (protection tax).<sup>31</sup> By the same token, ‘Abd Allāh b. Sa‘d the Governor of Egypt,, entered into a treaty (ṣulḥ) with the Nubians in 31 A.H/652 A.D.<sup>32</sup> The Nubians were famous for their skills in archery and successfully maintained their independence against Muslim attacks for many years. However, unlike the agreement with the Najran, the Muslims concluded with the Nubians an exchange of commodities, rather than on kharāj or jizyah, as their term of agreement.<sup>33</sup> Moreover, an agreement was also concluded between Mu‘awiyah and the Armenians

stipulating that they had liberty over their land and fully autonomous control over their internal affairs. In return, they had to pay jizyah to the Muslim authority.<sup>34</sup> In a later development, we find that the Ottoman sultans granted 'ahd wa amān to the tributary Christian princes whereby the latter made a yearly tribute in the form of kharāj in exchange for peace and security. It is absolutely an act of goodwill on the part of the Sultan through his good office.<sup>35</sup>

This state of affairs continues so long as the contracting parties respect and observe the terms of the agreement. The jizyah cannot be collected from them and the amount of land tax cannot be increased since they are not in dār al-Islām and more precisely, both parties have to abide by the original terms of agreement.

As regards to the situation created by a violation of the treaty, the various schools are not in agreement. According to al-Shāfi'ī, if their territory was then conquered, it came into the category of territory taken by force; and if it was not conquered, it became dār al-harb. Abū Hanīfah, however, maintained that if there were Muslims in that country, or if it was separated from dār al-harb by Muslim territory, the territory was still considered as dār al-Islām and the inhabitants were bughāt (rebels).<sup>36</sup> If neither of these conditions applied, the land became dār al-



ḥarb. On the other hand, two of Abū Ḥanīfah's companions, Abū Yūsuf and Muḥammad al-Shaybānī, argued that it became dār al-ḥarb in both cases.<sup>37</sup> As the latter, the father of Muslim public international law, has pointed out:

The crucial factors (to be considered) for every territory are authority and power in ruling that territory. If the rules/law of covenantees are enforced; the territory is dār al-muwāda'ah (territory of covenant). If on the other hand, the rules of others (from another territory) are in force; none of the inhabitants of the two territories could be considered under the rules of muwāda'ah.<sup>38</sup>

This statement clearly expresses that authority and force are two main factors that can determine the status of the territory, whether or not it should be considered as dār al-muwāda'ah. In the course of events, no matter what the opinions of the school may have been, these territories, throughout the course of the Muslim history, are to be finally included under the domain of dār al-Islām.

It seems that this theory, devised by the Shāfi'ī school of law, provides a proper basis for contemporary international relations between the Muslim and non-Muslim sovereigns. These contractual relations, which may be bilateral or multilateral are very important in order to safeguard the flow of trade and to ensure the socio-political-economic interests of the parties concerned. Moreover, the present state



of peace not war is a basis upon which the relationship, between Muslim and non-Muslim states, should be established. This can perhaps be considered as a possible justification for the idea of dar al-‘ahd and also a result of the development of a genuine relationship, that is to say, when they are in a state of belligerency, the twofold division of the world applies; but when the state of stability and peace prevails, a peace treaty relationship is indispensable. Finally, a peaceful relationship will be the only basis for the foreign relations of an Islamic state.

#### IV. The Nature of Relationship between Islamic and non-Islamic States.

Before we investigate the nature of relationships between Islamic and non-Islamic states, it is imperative to say something about the world order before the emergence of Islam and the relationship among the states in the pre-Islamic era. To begin with, we find that

Arabia, the Prophet's birth place, <sup>and surrounding areas</sup> were in a state of chaos and instability where every tribe could attack the other. In such a situation, the weaker community becomes the prey of the stronger; hence the law of <sup>the</sup> jungle prevails. This state of affairs continues so long as there is no covenant

or pact between the rival parties. Even if a pact exists the balance of power between the conflicting parties should always be maintained; otherwise the weaker state will be the object of aggression. The final say however, always rests with and belongs to powerful and influential parties.

It was in such a state of affairs that Islam emerged and proclaimed that the basis of relationships among the states, as among human beings, is peace not aggression. This is the position of the Qur'an and it was the practice of the Prophet during his war against the aggressors:

"Therefore if they withdraw from you but fight you not, and (instead) send you (Guarantees) of peace, then God hath opened no way for you (to war against them)."<sup>39</sup>

This verse shows clearly that international relationships in Islam should be based on peace. This relationship should be governed under these Qur'ānic precepts, i.e. human dignity,<sup>40</sup> men are originally from one community,<sup>41</sup> cooperation enjoins good and forbids evil,<sup>42</sup> tolerance,<sup>43</sup> freedom,<sup>44</sup> al-faḍīlah (moral excellence, virtue),<sup>45</sup> justice,<sup>46</sup> reciprocal treatment,<sup>47</sup> fulfilment of agreements,<sup>48</sup> and kindness and prohibition of immorality (fasad).<sup>49</sup> These are some major principles of international relations in

Islam. The Muslim state should adhere to these principles in every transaction with non-Muslim states in times of both peace and war. Just as these principles are good among the states, so they are also applicable in individual relationships. Such principles therefore should form the basis of a code of conduct of nations, ethnic groups, communities, organizations, business firms as well as individuals. It should be noted that in applying these principles no discrimination on the basis of race, religion or any background differences should occur in the process of decision-making or the stages of either planning or application. For the principle per se is the manifestation of the Will of God in respect of all human beings. Thus these principles could very well be universal and free from limitations of the space-time dimension.

If we turn back to the early intercourse between the Muslims and the polytheists of Mecca, we find that the early Muslims had to face all sorts of persecutions, slander, boycotts, and above all physical torture and killing as had happened to Bilāl b. Rabāḥ, the family of Yāsir and others.<sup>50</sup> Facing an unbearable plight, some of <sup>the</sup> Prophet's followers had to take refuge in Abyssinia where they found protection and were able to practice their new religion in the fullest sense of the word. Even after the Prophet's



migration to Medina, the Quraysh continued their pressure and planned for another strike. The struggle now shifted from direct to indirect confrontation. Their medium was the Jewish tribes, the Hypocrites and certain inhabitants of Medina. The Quraysh had tried all possible ways in order to annihilate the message of Islam including trying to take the life of the Prophet; whereas the Muslims had done nothing except to pronounce the word of God. But Islam did not emerge ex nihilo. This physical, psychological as well as emotional warfare that the early Muslims had undergone, leaving behind their wealth, families and friends, made them repeatedly ask permission from the Prophet to defend themselves and their faith. The Qur'an gives us a complete picture as follows:

To those against whom war is made, permission is given (to fight), because they are wronged; and verily God is Most Powerful for their aid;  
 (They are) those who have been expelled from their homes in defiance of right, (for no course) except that they say, "Our Lord is Allah" Did not God check one set of people by means of another, there would surely have been pulled down monasteries, churches, synagogues, and mosques, in which the name of God is commemorated in abundance measure. God will certainly aid those who aid His (cause); -for verily God is Full of Strength, Exalted in Might, (Able to enforce His Will).<sup>51</sup>

As we have pointed out earlier, the relationship between Muslims and non-Muslims is primarily based on peace. This peace process presumably remains in effect



until the Muslim community (State) is attacked or about to be attacked or the Muslims have no liberty in practising and preaching Islam. The war then becomes a necessity for self-defence or in defence of religion or defence of the freedom of religion. The Muslims had been driven out unjustly from their home, for no other reason than that they worshipped 'the One True God' (Verse 40). This was the first occasion on which fighting in self-defence was permitted.<sup>52</sup> The justification for fighting was far greater here, when the little and weak Muslim community was not only fighting for its own existence against the polytheists Quraysh, but for the very existence of their new Faith and its survival. Furthermore, the Qur'an has made the situation clearer as follows :

They ask thee concerning fighting in the prohibited month. Say: "Fighting therein is a grave (offence); but graver is it in the sight of God to prevent access to the path of God, to deny Him, to prevent access to the Sacred Mosque, and drive out its members." Tumult and oppression are worse than slaughter. Nor will they cease fighting you until they turn you back from your Faith, if they can....<sup>53</sup>

The episode did not stop at this point. The struggle continued. At one stage, the pagan Arabs approached the Prophet asking him to provide them with some teachers to teach Islam. Later, as the teachers arrived in good faith, they were brutally killed. The incident is known to the Muslim historians as the Bi'r Ma'Unah incident.<sup>54</sup> It was a bitter experience for the

Muslims. Moreover, in Medina, Banū al-Naḍīr together with Quraysh and some other tribes planned to abolish the Muslims' existence in Medina. The Muslims felt that the alliance was too strong to be faced in the battle-field. Instead they dug a trench about Medina to stop the advancement of the enemy. Banū Qurayzah, who were supposed to defend Medina and were allies of the Muslims betrayed them and conspired to join the enemy promising to attack the Muslims' line from behind.<sup>55</sup>

A full picture is portrayed in the Qur'ān as follows:

When they came upon you from above you and from below you, and when eyes grew wild and hearts reached to the throats, and ye were imagining vain thoughts concerning Allāh: There were the believers sorely tried, and shaken with a mighty shock.

And when the hypocrites, and those in whose hearts is a decease, were saying: Allāh and His messenger promised us naught but elusion.

And when a party of them said: O folk of Yathrib! There is no stand (possible) for you, therefore turn back. And certain of them (even) sought permission of the Prophet, saying: Our homes lie open (to the enemy). And they lay not open. They but wish to flee. (10-13).

Of the believers are men who are true to that which they covenanted with Allah. Some of them have paid their vow by death (in battle), and some of them still are waiting; and they have not altered in the least;

That Allāh may reward the true men for their truth, and punish the hypocrites if He will, or relent toward them (if He will). Lo! Allāh is Forgiving, Merciful. (23-24).<sup>56</sup>

The study of some of these events helps us to

understand better the events and the struggle of the early Islamic era, and also to comprehend how the Muslim responded to it and the relationship between the two conflicting parties. Hence, armed struggle has become part and parcel of the relationship with the non-Muslims.

We can also draw our conclusion that while Islam accepts peace as a basis of its external relations, this does not mean that Islam accepts surrender and capitulation to evil forces (bāṭil). For there will be no peace if it is based on falsehood and humiliation. Hence, there will be no alternative in this critical moment except to fight back in order to preserve peace. This is perhaps why permission to fight was revealed. The Muslims were forced to fight though it was hateful to them. Fighting in such circumstances is a rule of necessity.<sup>57</sup>

In the meantime, while war was going on for one reason or another, the jurists were contemplating whether Muslims' relations with non-Muslims is based on a situation of war or peace. Some said that it was based on war rather than peace. They based their arguments on reality, from what had actually happened, rather than texts. But the majority said that this relationship should be based on peace until there was a reason to fight.<sup>58</sup> The majority based their arguments on the texts of the Qur'ān, sunnah and the



wars that the Prophet had undergone as we have seen in the earlier discussion. Indeed, it is on the basis of this kind of relationship that Muslims and non-Muslims can live and work together for the betterment of mankind, world peace, and a better future for all.

#### V. Al-‘Aqīdah as a Basis for Division of Mankind

Unlike other systems of law, Islam takes a clear-cut position as to the division of people on account of their faith rather than on any other consideration. This attitudes manifests itself in the Qur'ān where it is declared that:

"It is He who has created you; and of you are some that are unbelievers, and some that are believers: And God sees well all that ye do." 59

This verse and others indicate clearly that people are of two kinds: a man may be either a Muslim or a non-Muslim. This division of human beings which is based on Islamic faith (‘aqīdah) holds a paramount significance in man's life. As such, according to the Islamic legal point of view this division is not merely theoretical in nature having no effect in one's life; on the contrary, the division is a key factor that will determine one's destiny in this world and in the Hereafter. For it is on the basis of this division that one's legal status and position determined in

the Islamic state. In addition to this, his position in the Hereafter is likewise affected and reward/punishment (jazā') is based thereon, as God says in the Qur' ān:

Then, as to those who believed and did righteous deeds, their Lord will admit them to His Mercy: That will be the achievement for all to see. But as to those who rejected God, (to them will be said): "Were not Our signs rehearsed to you? But ye were arrogant, and were a people given to sin!"<sup>60</sup>

According to the above verses, the Qur'an divides people at large into two major groups: Muslims and non-Muslims. This division is based solely on man's acceptance of Islam. It rejects all other peripheral basis whether social status, origins, race, colour, or any other denominational basis. Nonetheless, since the message of Islam is meant for all mankind,<sup>61</sup> it is in the capacity of every individual to join the Muslim community, and so to enjoy equal treatment from the Islamic state.

## VI. Categories of non-Muslims

There are several categories of non-Muslims. But according to the Muslim theory of international relations, the Muslim jurists have classified non-Muslims, in this respect, into four categories: ahl al-dhimmah, musta'min or musta'man, mu'āhid or ḥalif and, ḥarbi. In this work, the scope of discussion will be confined to the first category. However, references

to other categories will also be made where necessary. First, let us make a quick survey of every category.

A. Ahl al-Dhimmah (Protected People)

Al-dhimmah literally means al-amān (peace) and al-‘ahd (covenant/pact), thus ahl al-dhimmah, in the legal sense, are those non-Muslims, normally Jews, Christians and others, who have concluded a permanent agreement with a Muslim authority. They pledge loyalty to the State, pay jizyah and become subjects of the Islamic state. In return, the state, by virtue of the agreement, affords them positive protection and security as to their lives (and family), property and religion.<sup>62</sup> The beneficiaries of the dhimma are called dhimmis, and are collectively referred to as ahl al-dhimmah or simply dhimma. By concluding such a contract the state implicitly consents to the existence of non-Islamic elements on its soil and its consequences in return for receiving some jizyah from non-Muslim subjects.

This contract, according to Islamic history, was first introduced after the surrender of Mecca.<sup>63</sup> Prior to this event though the Prophet had concluded with the unbelievers in Medina and elsewhere some forms of agreement; but it was not considered as ‘ahd al-dhimma per se, hence there were no rules pertaining to the dhimma contract applied therein.<sup>64</sup> This view



can be justified when we take into consideration the fact that the ruling verses of jizyah revealed in the year 9 A.H. i.e., after the conquest of Mecca.<sup>65</sup> The verse reads as follows:

Fight those who believe not in God nor the Last Day, nor hold that forbidden which hath been forbidden by God and His Apostle, nor acknowledge the religion of truth, (even if they are) of the people of the book, until they pay the jizyah with willing submission, and feel themselves subdued.<sup>66</sup>

As regards the rationale for the contract, according to some jurists, it represents some sort of opportunity offered to non-Muslims to intermingle with Muslims, to hear and witness the justice and beauty of Islam and to transfer from harbī to dhimmī status. It is expected that by observing and experiencing Islam through direct contact with the Muslim community they will be able to appreciate the teachings of Islam.<sup>67</sup> This is the ideal interpretation as far as the contract is concerned, and therefore should preclude it being a means of internal revenues as has been suggested by some authors.<sup>68</sup>

As to the method of contract, there is no specific forms designed for this purpose. It can be concluded as any other ordinary contract provided that the imām (head of state) himself or his representative concludes the contract with the non-Muslims. Owing to the fact that this contract touches the interest and security of the state, it is natural that such a

sensitive contract should be executed and ratified by the highest authority of the state. Hence, it is a political rather than legal matter. As to the dhimmīs they could enter into this contract either by surrendering themselves to the political authority which has established itself in their country, thus becoming subjects of that authority, or by approaching the Muslim authority individually or collectively should their country not have concluded any agreement with an Islamic state,<sup>69</sup> or by entering into a peaceful agreement as the people of Najran and Banu Taghlib did during the time of the Prophet and ‘Umar respectively.<sup>70</sup>

It should be borne in mind that by concluding the contract, the Islamic state is under obligation not only to tolerate the non-Muslim's faith, religious practices and laws, but also to offer them protection of their lives and properties as ‘Alī b. Abī Ṭālīb, the fourth Caliph said: "The contract has been granted so that their properties (are to be considered) as our properties and their blood as ours."<sup>71</sup> For this reason, the dhimmīs are granted certain rights and their position in the Islamic state, from the very beginning, is unique. In return, they accept Islamic rule, pay jizyah and some other obligations towards the state. In the following chapters these matters will be discussed in detail.

## B. Other Categories of non-Muslims

Conceptually speaking, the ḥarbī, whether a Scripturary or a polytheist, is a citizen of dār al-ḥarb, regardless of his country of origin.<sup>72</sup> Since dār al-ḥarb is, in theory, at war with dār al-Islām, its citizen is also considered to be in a state of war with the Muslims.<sup>73</sup> This state of affairs continues so long as there is no agreement or pact between the two states. If there is an agreement of any sort such as a non-aggression pact with the Islamic state, the citizen of that state is called mu'āhid or ḥālīf.<sup>74</sup> The relationship between the two parties is governed by their agreements. The Prophet is reported to have said in this respect: "Whoever enters into a pact with a people should neither relax its terms nor tighten them until it expires or it be returned to them on terms of equality."<sup>75</sup>

On the other hand, there are cases where the citizen of dār al-ḥarb could apply for the amān (safe conduct) which would permit him, his family and property, to travel or reside in dār al-Islām for a limited period, hence he is called musta'mīn.<sup>76</sup> This situation is vital for the purposes of trade, tourism, missions or the like.<sup>77</sup> The Qur'ān signals its approval of this as follows: "And if anyone of the idolaters seeketh thy Protection (O Muḥammad), then protect him so that he may hear the word of Allāh, and



afterward convey him to his place of safety. That is because they are a folk who know not."<sup>78</sup>

In Islamic law, the amān may be given either by the imām, his representative, and individual Muslim. The former may be called "official" whereas the latter is "unofficial" amān.<sup>79</sup> It should be noted that no jizyah is imposed on the musta'min but 'ushr if he is a merchant.

## CHAPTER TWO

### DHIMMĪ'S OBLIGATIONS

In this chapter four main topics pertaining to the dhimmī's obligations as resident of the Islamic state will be discussed. They are jizyah, kharāj, ʿushr, and the observance of some aspects of the Islamic law. The first two, as frequently dealt by the classical jurists, will be surveyed in detail; while the remaining two topics will only be touched on briefly here. This is in order to avoid repetition as they will be discussed from time to time during the course of this study.

#### I. Jizyah (Protection Tax)<sup>1</sup>

##### A. Basic Notion of Jizyah

Perhaps one of the most controversial issues, in the course of discussion of the concept of dhimmī, is one pertaining to the concept of jizyah and its application vis-à-vis non-Muslim subjects. At the outset, we would like to state our position that we do wish to avoid the confusion in some writers<sup>2</sup> about the nature of jizyah and kharāj. Our position is that jizyah is a tax on dhimmī; whereas kharāj is a tax on land, though at times, both appeared to be interchangeable and loosely used by some Muslim

historians as well as jurists.<sup>3</sup> This position is justifiable if we take into consideration that jizyah is the Qur'ānic injunction whereas kharāj is the ijtihād of 'Umar I which later became the consensus (ijmā')<sup>4</sup> of the Prophet's Companions.<sup>5</sup>

The law pertaining to jizyah is derived from the following verse:

Fight against such of those who have been given the Scripture as believe not in God nor the Last Day, and forbid not that which God hath forbidden by His messenger, and follow not the religion of truth, until they pay the tribute (jizyah) readily, being brought low.<sup>6</sup>

It is said that this verse was revealed to the Prophet commanding him to attack the Byzantines.<sup>7</sup> Soon after that the Prophet and his Companions proceeded to Tabūk in the year 9 A.H. /630 A.D. They met no resistance. Thus, the Prophet concluded a treaty with the inhabitants stipulating that they pay jizyah.<sup>8</sup> Thereafter, many Christian principalities bordering the Syrian regions concluded the same treaty. They agreed to pay jizyah and in return, they were granted complete protection as to their life, property and religion.<sup>9</sup>

The above two sources, which gave rise to the concept of jizyah viz. the Qur'ān and the Prophetic tradition, form the basis on which the Muslim jurists developed the concept by recourse to ijtihād, when



facing a new problem with a different situation, after the rapid expansion of the Muslim territories. It is under this precept and understanding that we find, at times, in different parts of the early Muslim Caliphate, the policy-makers were not in agreement in the course of implementation of the jizyah's concept. This state of inconsistency in decision-making, after a careful diagnosis, we find that it was partly due to the exigencies of the situation and its local's need and partly because the authority exercised their own i'tihād. However, it should not be a matter of prolonged discussion for those who comprehend the Islamic legal history. Needless to say, notwithstanding that some Muslim authorities, at times, had abused its power vis à vis the dhimmī. But it is suffice to remind them the warning of the Prophet:

"Beware whosoever is cruel and hard on a contractee or imposes on him more than he can bear, I will be his opponent (on the Day of Judgement)." <sup>10</sup>

‘Umar I on his deathbed said: "I advise my successor to comply with the covenant made with those under the protection of the Prophet, protect them from those who persecute them and do not impose burden more than they can bear." <sup>11</sup>

It is interesting to point out here that the exegetes (al-mufasssīrūn) as well as the jurists are not in agreement in their efforts to elaborate the

Qur'ānic terms 'an yadin<sup>12</sup> and ṣāghirūn<sup>13</sup> at the end of the above verse. According to the important exegete Ṭabarī (d. 310/922), a founder of a school of law, the former means "from his' (dhimmī) hand to the hand of the collector." As for the latter Ṭabarī recorded that there were three opinions. First, to pay (jizyah) in the standing position while the receiver (collector) is sitting; second, to pay for themselves by their own hands against their will. This is reported to be the opinion of Ibn 'Abbās (d. 68/687); and finally, the act of paying per se is meant by the term.<sup>14</sup>

The Mu'tazilite exegete Zamakhsharī (d. 528/1133), however, maintains that the former could be the hand <sup>the</sup> of payer (giver) or the receiver. This would mean that at his (the payer's) will he gives his hand. For if he refuses or declines, he would not give his hand. Zamakhsharī argues that <sup>the</sup> act of receiving a jizyah and leaving their life and property intact is a great honour and blessing (ni'mah) for them.<sup>15</sup> On the other hand, Qurṭubī (d. 671/1272), another important exegete, reports that there were several opinions concerning the first term. According to Ibn 'Abbās it means that the dhimmī pays himself without intermediary, whereas Salmān says that it means "under protection". Ma'mar however narrated from Qatādah (d. 117/735) that he said, "by force." It is said that it also could mean

giving them (dhimmī) a comfortable and a carefree life after taking a jizyah.<sup>16</sup> This last opinion seems to be in harmony with that of Zamakhsharī. It is therefore apparent that both terms are used as being complementary to each other, in this verse, in order to give more coherence to the concept and <sup>make it more</sup> exclusive in meaning.

At any rate, we should not take the state of submissiveness, for non-Muslim subjects, in its strict literal sense. Rather it should be taken in <sup>a</sup> legal and political sense. For the verse in question, in its general context, is Medinan.<sup>17</sup> The nature of Medinan verses normally deals with the socio-political-economic aspects of the ummah rather than fundamental questions of belief and metaphysics. In the words of Shāfi'ī, he says that 'an yajri'a 'alayhim hukm al-Islām, i.e. the rules of Islam should be applicable for them or submission to the authority of Islam.<sup>18</sup> This interpretation is in line with the modern political theory of sovereignty where every subject is expected to render his loyalty and obedience to the state. The fact that the dhimmī had concluded the contract is a prima facie reason for him accepting the authority and rules of Islam. It is because of the contract that he is liable for jizyah.<sup>19</sup>

It is worth mentioning here that taxes like jizyah were not introduced by the Muslims. In fact, such a



tax had been imposed by the different sovereigns on their respective subjects before the emergence of Islam. Ṭabarī records that Anūshirwān, the Persian emperor at the birth of the Prophet, imposed a tax on non-warring subjects for defence purposes. The emperor made this ruling in order to motivate the soldiers as they risked their lives in the defence of the country. Therefore, they deserved something from the public. It is for this reason that the emperor imposed the tax on the people and it was later known as jizyah.<sup>20</sup> It is reported that the Byzantines imposed the same tax on the people of coastal regions of Asia Minor <sup>around</sup> 500 C.E. [A] similar tax was also imposed by the Byzantines upon the conquered peoples and it was reported that the amount was far greater than what was introduced by the Muslims.<sup>21</sup> Even the term jizyah itself, according to Shiblī Nu'mānī, has been Arabicized from the term kizyat which means a levy which the Persian emperors used in the administration of war affairs. Shiblī argues further that this term was either in currency in both languages, or the Arabs adapted it from the Persian language. But what seems likely is that the Arabs first knew about this tax from the Persians.<sup>22</sup> According to Cahen the Roman-Byzantine empire had a more complex system of tax including a personal tax which was only used for colonists and non-Christians. The Sāsānid empire had a

dual system of tax namely, a general tax on land and a poll tax, at <sup>rates</sup> varying (depending on the capability of the tax-payer but the aristocracy were exempted.<sup>23</sup>

There is no sharp disagreement among the jurists as to those who should pay jizyah. Initially, it was collected from ahl al-kitāb (People of the Book i.e. Jews and Christians), but at later stage, it was expanded to include the Majūs (Magians), Ṣābīs (Sabeans), and Sāmīrah (Samaritans).<sup>24</sup> Certain Christian tribes like Banū Taghlib and the Najrān had been given special treatment, therefore no jizyah was collected from them, though they had concluded a contract hence ahl al-dhimmah, instead a special tax was imposed on them.<sup>25</sup> As for the Magians although they are not considered as People of the Book, they were, as far as the jizyah is concerned, treated as one of them. It is reported that the Prophet collected jizyah from the Magians of Bahrain and it is also reported that 'Umar I imposed jizyah on the Magians of Iraq without disapproval from any one of the Prophet's Companions.<sup>26</sup> From the Tradition we encounter the following reports concerning the Magians:

Yahya related to me from Mālik that Ibn Shihāb said, "I have heard that the Messenger of Allāh, may Allāh bless him and grant him peace, took jizyah from the Magians of Bahrain, that 'Umar ibn al-Khaṭṭāb took it from the Magians of Persia and that 'Uthmān ibn 'Affān took it from the Berbers."

Yahya related to me from Mālik from Ja'far ibn Muḥammad ibn 'Alī from his father that 'Umar ibn al-Khaṭṭāb mentioned the Magians and said, "I do not know what to do about them." 'Abd al-Raḥmān ibn 'Awf said, "I bear witness that I heard the Messenger of Allāh, may Allāh bless him and grant him peace, says, 'Follow the same sunnah with them that you follow with the People of the Book.'" 27

According to Mālik, Abū Ḥanīfah and his companions that the jizyah was taken from the Magians not because they were People of the Book, but rather they were considered as 'ajam (non-Arab). On the contrary, Shāfi'ī and Abū Thawr (d.240/854), a founder of a school of law, are of the opinions that they were People of the Book.<sup>28</sup> Shāfi'ī reaches such a conclusion apparently because he relies on the saying of 'Alī ibn Abī Ṭālib on the authority of Sufyān from Abū Sa'īd from Naṣr b. 'Āṣim that 'Alī was asked about the Magians, 'Alī replied that they were ahl al-kitāb but their book had been taken away from them.<sup>29</sup> As for the Sabeans and Samaritans there is no agreement among the jurists. Some jurists such as Abū Ḥanīfah say that they are People of the Book while others held otherwise. At any rate, many jurists are of the opinion that if their religions are compatible with any of the People of the Book, they are the People of the Book; otherwise they could<sup>not</sup> be considered as the People of the Book.<sup>30</sup>

A consensus also arises among the jurists that



the Prophet refused to accept jizyah from idolaters or pagan Arabs let alone the Quraysh. For they were not to be tolerated as the People of the Book. They have to choose between <sup>the</sup> Islam or sword.<sup>31</sup> As to the non-Arab polytheists, the jurists are in disagreement on the basis of receiving jizyah from them. Mālik, Abū Ḥanīfah and his companions held that jizyah is accepted from non-Arabs whether they are People of the Book or otherwise, i.e. non-possessors of the book, idolaters, and those who have no religion at all. They should take the rule and be treated as Magians.<sup>32</sup> al-Awzā'ī (d. 157/774), a Syrian jurist, says that those who are not People of the Book are Magians.<sup>33</sup> This is also the opinion of al-Thawrī (d. 161/778), a Kūfī jurist.<sup>34</sup> But Abū Thawr says that jizyah is not acceptable except from People of the Book as explicitly expressed by God (in the verse in question). So the question of Arabs or non-Arabs is immaterial for him.<sup>35</sup> This seems to be the opinion of Shāfi'ī but he takes the trouble to define the People of the Book.<sup>36</sup> Shāfi'ī maintains that God only permits to take jizyah from People of the Book. Therefore, no one can take jizyah except from those whom God has permitted to take it from them. The rest of the people according to Shāfi'ī have to face war as commanded by God, "And fight them until persecution is no more, and religion is all for God...."<sup>37</sup> The fact that the

Prophet took jizyah from the Magians suggests that they are ahl al-kitāb.<sup>38</sup>

On the other hand, there is an extreme opinion attributed to al-Ḥasan al-Baṣrī<sup>39</sup> saying that jizyah is accepted according to <sup>the</sup> ancestral-line of the people. Otherwise, ~~it~~ could not have been accepted from the Magians and the prohibition of taking jizyah from polytheist Arabs <sup>would not have been possible;</sup> both of them (the Magians and the polytheist Arabs) had no book.<sup>40</sup> However, Mālik, and those who have the same opinion ~~as he~~, argue that it is an established fact that jizyah was taken from the Magians who have no book; if jizyah could not be taken except from People of the Book, it therefore follows that jizyah could not be taken from the Magians. The fact that it is permissible <sup>to</sup> take jizyah from the Magians clearly indicates that it is also legally permissible <sup>to</sup> take jizyah from all non-Arabs regardless <sup>of</sup> whether they are People of the Book or polytheists.<sup>41</sup>

#### B. Who Pays jizyah.

One of the unique <sup>features</sup> of this tax is that it is only collected from adult males, who have reached the age of puberty. Those who are physically unfit and mentally unsound are exempted from jizyah.<sup>42</sup> So, there is no jizyah on women, children, old men and <sup>the</sup> insane<sup>43</sup> as war is not waged against them and also because

jizyah was prescribed on able-bodied men (ahl al-qitāl) according to the spirit of the verse.<sup>44</sup> According to Ibn Ḥazm (d. 456/1063), a Zāhirī jurist, jizyah is also imposed on women as it is imposed on men. He relies heavily on the verse in question stating that God has made no difference between men and women in matters of religion and responsibilities to it. He also depends on the Tradition which says that the Prophet is reported to have commanded Mu'ādh b. Jabal, when sending him to Yemen, to collect one dīnār from men and women or the equivalent.<sup>45</sup> There is some modern relevance to this view especially in the present day's situation where women have made significant achievements in their lives. In some cases, women are now even more independent and established financially than many men.

Jizyah is also exempted from the poor (who are entitled to ṣadaqah).<sup>46</sup> The blind and cripples only pay when they are wealthy. Similarly, monks are exempted, if they are poor. However, if their institutions are wealthy, their superiors have to pay the tax.<sup>47</sup> These are the opinions of the majority schools of law except the Shāfi'ī who contend that jizyah is just like the rent of the house. Therefore, the obligation to pay the rent is by no means different between the wealthy and the poor.<sup>48</sup> But within the Shāfi'ī school, however, there is an opinion saying that the poor, the



blind and the like should be exempted from paying jizyah.<sup>49</sup> Qurṭubī concludes that it is a consensus of scholars that jizyah is imposed on a free mature man namely, those who are able to fight but the women, children, slaves, <sup>the</sup> insane and old men are exempted.<sup>50</sup>

Another feature of <sup>the</sup> relaxation of the rule of jizyah is that it could be paid both in money or in kind, i.e. in garments, livestock, grain or the like. But wine, carrion and pigs are not legal payment; for these items, according to Islamic law, ~~have~~ have no value and should not be accepted.<sup>51</sup> Abū Yūsuf, however, says that 'Umar b. al-Khaṭṭāb prohibited taking jizyah from those articles and ordered that they should be sold and the tax paid from such sale.<sup>52</sup> From this report, we find that 'Umar I has set up a precedent on how to deal with such cases. It entails a legal question as to whether ~~it~~ is lawful for the Muslim authority to collect tax, any tax, from the sale of prohibited materials such as pigs, liquor and the like. We will discuss these matters in detail in the following chapters.

The jurists also dispute as to when the tax should be collected. This would appear to be an administrative matter. However, <sup>in</sup> some cases the method of payment is expressly stated in the agreement as we shall see in the respective treaties.

### C. The Amount to be Charged

Initially, this tax was collected at the rate of one dīnār or its equivalent per person as has been mentioned earlier in the case of the people of Yemen. It is reported that the Prophet took one dīnār from the people of Aylā and the Meccan Christians.<sup>53</sup> It is reported that 'Umar I introduced a new measure according to the capability of the tax-payer at the rate of forty-eight dirhams on the wealthy, twenty-four on the middle class, and twelve on the poor or the manual workers respectively.<sup>54</sup> Abū 'Ubayd in his comment on the act of 'Umar says: "The rate could be increased or otherwise according to the capability and prosperity (al-yasār) of the people. Had 'Umar known that jizyah was at <sup>the</sup> fixed rate prescribed by the Prophet, he would not have changed it."<sup>55</sup> It is most likely that the Syrians and the Iraqis at that time were wealthier than the Yemenis. Kāsānī, however, in trying to justify the same act says that jizyah is of two kinds : (1) Jizyah is collected on the basis of mutual consent which is the case of al-ṣulh where the parties agreed at a specific amount or kind of payment as the Prophet had concluded with the people of Najrān; and (2) Jizyah is imposed by <sup>the</sup> Imām unilaterally according to his discretion when the land is occupied by force.<sup>56</sup>

When 'Umar took his decision (iṭṭihād) in the

presence of the Companions of the Prophet, both anṣār and muhājirīn, none of them are reported to have objected to the decision. Therefore, it became a consensus of the ummah with all its implications.<sup>57</sup> As a result, 'Umar, in introducing a new measure based on the income of tax-payer, in fact, as in many cases of his rulings, created a new concept of taxation known in modern times as graduated assessment.

Another formula of the tax which had been imposed on the dhimmī in the Islamic state was charged <sup>on a</sup> basis of group or community rather than on the individual. In this way, the head of the community is responsible for collecting the tax and paying it to the Muslim authority. It is therefore a collective or communal (tribal) responsibility based on a proportional share-tax system. Perhaps this kind of method was the one used by Khālīd b. Walīd when he charged the people of Ḥīrah for 60,000 dinārs per year after he had found that the total population liable to pay tax in the area was 6000.<sup>58</sup> It would seem that Kāsānī's view is more relevant here, for a fixed standard of jizyah to be applied to all people would seem unfair. This is because the degrees of well-being and natural resources of the people vary from place to place and from time to time. To fix a standard rate for all people is not only unfair, but undermines the earlier precedent. It follows that the amount of



jizyah should be either negotiated and agreed upon by both parties; thus the will of the contracting parties prevails as it says in the maxim that "the contract is the legislation of the contracting parties";<sup>59</sup> or the Imām imposed it at his discretion in the case of no negotiation, i.e. after the fighting. In both cases, however, the role of ijtihād is there. Therefore, we can conclude that the amount of jizyah is the subject of ijtihād of the authority concerned apart from it being an administrative matter and it may vary from time to time even among the same people.

#### D. The Jizyah Is Not A Punishment.

Although some Ḥanafī jurists even held that jizyah is imposed on dhimmīs in order to punish them for their continuous state of infidelity,<sup>60</sup> that view is incompatible with the practice of the Prophet and his Companions as we shall see in their treaties with non-Muslims. It is also against the concept of contract per se which denotes security and protection. Furthermore, it also contradicts the concept of tolerance in Islam where the Qur'ān states clearly that there should be no compulsion in Islam.<sup>61</sup> For their infidelity is to be counted in the Hereafter. If jizyah is a retributive measure it must be imposed on all non-Muslims and surely there would

be no certain groups of people exempted from paying it. Finally, if any non-Muslim joins the Muslim army voluntarily, his obligation to pay jizyah is to be lifted as we shall see. The Prophet used to advise his Companions, hence the Muslims, to treat ahl al-dhimmah (the protected people) with special care, leniency and not to harass them.<sup>62</sup> The proper way to convey the message of Islam is to invite the people in a good manner and to use the faculty of reason as the Qur'ān says:

Call unto the way of thy Lord with wisdom and fair exhortation, and reason with them in the better way. Lo! thy Lord is best aware of him who strayeth from His path, and He is Best Aware of those who receive guidance.<sup>63</sup>

#### E. The Case of Banū Taghlib <sup>64</sup>

As has been mentioned earlier, Banū Taghlib, with respect to paying jizyah, occupy a special position, i.e. they did not pay jizyah per se but ṣadaqah. Their position has been reported by many historians as well as jurists. During his reign, 'Umar I wanted to imposed jizyah on them. But they were reluctant to pay contending that they were Arabs and would be ready to pay ṣadaqah or zakāt as the Muslims do. Initially, 'Umar I refused to take ṣadaqah from non-Muslims. Conceptually speaking, it is a form of worship ('ibādah māliyyah) and it is only meant for the

Muslims. As a result, some of them fled and joined the Byzantines. Fearing that the issue would escalate further, 'Ubādah b. Nu'mān al-Taghlibī<sup>65</sup> approached the Caliph and suggested that if the issue was not resolved quickly there could be a possibility that the enemy (Byzantines) would use them against the Muslims. Since Banū Taghlib were known to have considerable power, their alliance with the enemy could upset the balance of power in the region, something that the Muslims could not afford to allow to happen at that time. Bearing in mind all these factors, the Caliph concluded a peace treaty with the Banū Taghlib stipulating that they pay twice the rate of ṣadaqah of the Muslims and that they should not baptise their children. 'Ubādah says that they did baptise their children hence, <sup>they</sup> did not comply with the latter condition. Their treaty therefore was no longer enforceable (falā 'ahd lahum).<sup>66</sup>

There has been no objection reported, from the Companions of the Prophet, to the decision of 'Umar I. Therefore, according to the principle of Islamic law, it has become a consensus (ijmā') binding all the ummah. Later jurists such as Ibn Abī Laylā, Abū Ḥanifah, Abū Yūsuf, Shāfi'ī, Aḥmad b. Ḥanbal, and others also agree with the act of 'Umar I.<sup>67</sup> On the other hand, Mālik b. Anas held that jizyah should be taken from the Christians of Banū Taghlib as it is



taken from another dhimmī. According to Mālik there should be no difference treatment on matters of jizyah between Banū Taghlib and the rest of dhimmīs.<sup>68</sup> This is also apparently the decision of 'Umar II (d. 99/717) who says: "By God I shall take only jizyah from them." He relies on the generality of the verse in question.<sup>69</sup>

At any rate, since the decision was taken in the presence of major Companions of the Prophet and there was no objection reported, hence it became the consensus and legally valid precedent. It therefore entails a legal question as to whether the same treatment (pact) could also be given to any particular group of non-Muslims who came within the same criteria as Banū Taghlib. There was the view that if there is a genuine case such as the circumstances of Banū Taghlib then it is the prerogative of imām to decide as to what decision could serve the best interest of the ummah provided that the non-Muslims have: (1) considerable power and authority; (2) they refused to pay jizyah but would consider a treaty (ṣulḥ) and thereby alternative payments as a tax in the present time; and (3) their threat is imminent if no agreement is reached. So the test is therefore whether the group has a power to challenge the Muslim authority and the danger of not having an agreement with them. This seems to be the logical and proper analogy with the

rule set by 'Umar I to be applied by any subsequent Muslim authority when facing a similar case such as that of Banū Taghlib. This ... appeared to be a view suggested by Abū 'Ubayd, Shāfi'i, and Ḥanbalī jurists.<sup>70</sup>

It should be noted here however when the concept of ṣadaqah or zakāt is applied to non-Muslims, the rules and regulations of zakāt rather than jizyah must be followed. Dhimmī women, for instance, should pay zakāt whereas under the rules of jizyah women were exempted.<sup>71</sup> Finally, the case of Banū Taghlib is a unique precedent set by 'Umar I which perhaps could be applied by a contemporary Muslim authority when facing the similar case.

#### F. Cases Where Jizyah Is Exempted

There are several cases where jizyah is exempted or lifted from dhimmī. For example, the dhimmī converts to Islam, death, lapse of time, the state unable to protect them, joining the Muslim army (defence) and excusable difficulties such as being poor, old, cripple, unable to work and the like. Some of these cases however are subjects of disagreement among the jurists.

### 1. Converts and Death.

Some jurists are of the opinion that jizyah is not to be charged when a dhimmī becomes Muslim or dies. This means that when jizyah is due for one year or more after they have converted to Islam or die, that jizyah is not collected from them. In the case of death, no jizyah would be taken from his bequest, nor on his heirs. For according to those jurists jizyah is not a debt. Jizyah also would not be collected when a dhimmī becomes blind, cripple, old (not able to work) and poor. This is the view of Mālik, Abū Ḥanīfah and his companions.<sup>72</sup> They rely on the saying of the Prophet that "There is no jizyah on Muslim,"<sup>73</sup> and it is also reported that 'Umar I dropped jizyah from a dhimmī who had become Muslim.<sup>74</sup>

According to Shāfi'ī jizyah should still be collected from a dhimmī who becomes a Muslim or dies if it is due for one year or more. It is still to be collected after his conversion, and in the case of death, the jizyah is to be collected from his wealth before it becomes the subject of inheritance, which is to be divided among the surviving heirs, and his bequest. Indeed, it is just like the debt owed to a human being thus, there is no room for imām or qāḍī (judge) to exercise his discretion. If the dhimmī converts or dies before one full year (al-hawl), then the jizyah is due and charged in accordance with the



portion of the year which has passed, a quarter, a half or the like. For according to Shāfi'ī jizyah is made obligatory in lieu of permission to stay in dār al-Islām and by analogy it is a rent that the dhimmī has to pay from the portion of the year that he lives therein.<sup>75</sup> However, in the book of Siyar al-Wāqidī, Shāfi'ī says that if a dhimmī becomes a Muslim before the jizyah is due, he will be exempted. But if he converts after due date, then he should pay jizyah.<sup>76</sup>

It seems that Ḥanbalites are in harmony with Ḥanafite jurists in this regard. They held that jizyah is to be exempted when dhimmī becomes Muslim after the due date. They rely on the verse which read: "Say to the unbelievers, if (now) they desist (from unbelief), their past would be forgiven them; but if they persist, the punishment of those before them is already (A matter of warning for them)."<sup>77</sup> However, in the case of death, the Ḥanbalites depart from Ḥanafites saying that it should not be treated as conversion when the death occurred after the due date. In this case, the jizyah still can be taken from his estate. But if the death took place before one year, naturally the jizyah will be exempted from him for a simple reason that jizyah is not due and it will not be collected, in any circumstances, before the completion of one year. Some Ḥanbalites, however, say that jizyah should be exempted by a death regardless

of when he dies. For it is like hudūd punishment; when the culprit dies, it ceases to exist. But Ibn Qudāmah, a Ḥanbalite jurist, contends that jizyah is a debt which had been made obligatory on him during his life. Therefore, it should not be exempted by death. He argues that it is like the case of debt that the dhimmī owes to <sup>a</sup>human being. This situation is rather different from the hudūd because with the death of the accused there will be no more object of punishment. But that is not the case of jizyah.<sup>78</sup>

Abū ‘Ubayd in elaborating the Tradition “laysa ‘alā muslim ṣadaqah,”<sup>79</sup> says that “when a person converts to Islam at the end of the year (when jizyah had become obligatory for him), by so doing the jizyah will be exempted from him.” This is simply because the Muslim does not pay jizyah and therefore it will not be a debt for him. It was reported from ‘Umar I, ‘Alī b. Abī Ṭālib and ‘Umar II that they had taken the position in agreement with this meaning.<sup>80</sup>

As to the exemption in the case of death, since jizyah was not intended for material gain but its purpose of legislation was perhaps to pave the way to becoming a Muslim as Qarāfī (d. 684/1285), a Mālikī jurist, says: “God has legislated jizyah in the hope that the dhimmī will accept Islam in the future as a result of living in dār al-Islām and observing the beauty of Islam.”<sup>81</sup> In this case since dhimmī has



deceased it defeats the purpose, hence the imposition of jizyah was of no avail.<sup>82</sup>

## 2. Lapse of Time

If the dhimmī, for one reason or another, has not paid his jizyah for one year or more is he still to pay the overdue jizyah or not? In trying to answer this question, the jurists, again, are not in agreement. Abū Ḥanīfah says that the dhimmī is not required to pay his past jizyah<sup>83</sup> and the jizyah for the new year until its due date. Two of Abū Ḥanīfah's companions however do not share his opinion. Instead, they maintain that dhimmī should pay his past jizyah together with that due for the new year.<sup>84</sup> They maintain that jizyah is just like kharāj. Both are debts. They are like ordinary debts which can not be exempted even if they are overdue. This is because the dhimmī is still alive. The case will be different if he dies or converts.<sup>85</sup> But Abū Ḥanīfah argues that to compare jizyah with kharāj is inappropriate in respect of its late payment and consequence. For there is no element of ṣighār (submission to the authority of Islam) nor punishment in kharāj. This is self-evident from its imposition on Muslims whereas there is no jizyah on Muslims. Furthermore, if a non-Muslim becomes Muslim after one year, he would still have to pay kharāj on his land but not the jizyah.<sup>86</sup> With all



these differences, it is clear that jizyah can not be compared with ordinary debts, thus, the analogy of jizyah to kharāj is baseless and unfounded.

On the other hand, the opinion of other schools of law such as Shāfi'ites and Ḥanbalites are almost unanimous in saying that lapse of time should not allow the jizyah to be exempted. It is a financial obligation to be paid annually. It therefore can not be included as interlock (intergradation) in the unpaid jizyah of the previous years as in the case of diyah (blood-money).<sup>87</sup> Thus, the arguments put forward by Abū Ḥanīfah do not support his position, for jizyah is by no means a punishment, as has been discussed earlier. On the contrary, it is a result of a contract and it could also be interpreted as a sort of financial contribution, on the part of the dhimmī, for the defence of dār al-Islām since he is not physically enlisted in the forces. This is perhaps the logical interpretation of the payment of the jizyah, hence, the duty to pay it should not lapse with time.<sup>88</sup>

### 3. Withdrawal of Protection

As has been mentioned earlier jizyah is paid for the protection given to a dhimmī by the state. Islam does not require a dhimmī to bear the responsibility of defence against external attack militarily. This is partially in order to respect the dhimmī since they do not share the ideology of the state. For defence is a matter of deep commitment and undivided loyalty to the state. It costs lives. Conventionally speaking, defence is a state matter. If a Muslim authority, for one reason or another, felt that it could no longer protect the non-Muslims there would be no more valid reason to collect jizyah. If it had been paid, it should be refunded. This is what is reported actually to have happened in the time of the Companions of the Prophet. These are some examples:

a. Abū Yūsuf reports that in the time of 'Umar I, Abū 'Ubaydah b. al-Jarrāḥ, the then Commander in Chief of the Muslim army, ordered the local administrators of Syria to refund all the jizyah collected. This was owing to the fear of imminent danger brought on by news that the Romans had raised an enormous army to attack the Muslims. Abū 'Ubaydah explains: "We have receive news that a powerful army is advancing against us, so we have refunded to you the money that was collected. For this money was paid upon the understanding that you would be protected and defended

by us, and upon our pledge to fulfil this duty. We are now in no position to keep our pledge. However, if God grants us victory over the Romans, you can consider us bound to what we have taken upon ourselves in our mutual agreement."<sup>89</sup> Abū Yūsuf adds that the Christians, overwhelmed by the fair treatment of the Muslims, gave their blessing to the Muslims, desiring their victory over the Romans, who would not have acted in such fairness and honour.<sup>90</sup>

b. The same pledge and treatment was reported by Balādhurī in <sup>the</sup> treaty made by Ḥabīb b. Maslamah with the people of Taflīs [Tiflīs] during his campaign in Armenia.<sup>91</sup>

c. In the treaty concluded by Khālīd b. al-Walīd with Ṣalūbā b. Naṣṭūrā of Ḥīrah, he made it clear that jizyah was for protection... "If we protect you, then jizyah is due to us; but if we do not (or unable to do so), then it is not due."<sup>92</sup>

#### 4. Military Service as an Alternative to Jizyah

As stated above, the jizyah is collected in lieu of security and protection rendered to <sup>the</sup> dhimmī by the state. But there is no injunction in Islamic law as to preclude a dhimmī from taking the task of defence of the state. According to Shāfi'ī in Siyar al-Wāqidī the Prophet initially was reluctant to accept participation from non-Muslims in the battle of Badr.



But two years later in the expedition of Khaybar, he accepted some Jews of Qaynuqā' to fight with him. In like manner, in the battle of Ḥunayn in the year 8 A.H./629 A.D., the Prophet also received the help of Safwān b. Umayyah, the polytheist.<sup>93</sup> From these evidences, it is clear that non-Muslims may join the Muslim army especially in the defence against the external attack which by and large endanger his family as well as his property. Thus, if a dhimmī willingly defends dār al-Islām, then he actually performs his duty as a responsible citizen and thereby should deserve exemption from jizyah, for basically jizyah is charged on able-bodied man. The following examples, perhaps, will serve illustrate the point:

a. Ṭabarī reports that in the treaty made by 'Utbah b. Farqad with the people of Adharbayjān it reads:

In the name of Allāh, the Beneficent, the Merciful. This is what 'Utbah b. Farqad, ʿāmil [tax-collector] of 'Umar b. al-Ḳhaṭṭāb the Commander of the Faithful, has granted to the people of Adharbayjān ... all of them shall enjoy amān (safety) for their lives, properties and religions provided that they pay jizyah according to their ability... whoever joins up the force (among them), he will be exempted from jizyah for that year....<sup>94</sup>

b. Ṭabarī also reports that Shahrabarāz, a King of al-Bāb, a region in Armenia had asked Sarāqah b. 'Amr, amīr (governor) of that region to exempt him and those with him from jizyah. In return, the King will do

whatever is needed from him against the enemy. Sarāqah accepted the offer and wrote to the Caliph asking for approval. The Caliph approved it and praised him.<sup>95</sup>

c. Balādhurī reports that Ḥabīb b. Maslamah al-Fihri, governor of Antioch made a treaty with the people of al-Jurjumah. Terms were made stipulating that al-Jarājimah would act as helpers to the Muslims, and as spies and frontier garrison in Mount al-Lukām. In return, it was agreed that they pay no tax, and that they keep for themselves the booty they captured from the enemy in the view of the fact that they were fighting alongside the Muslims. All those who lived in the city besides the Jarājimah were also entered into the same treaty.<sup>96</sup>

d. Thomas Arnold says: "The jizyah was levied on the able-bodied males, in lieu of the military service they would have been called upon to perform had they been Musalmans; and it is very noticeable that when any Christian people served in the Muslim army, they were exempted from the payment of this tax." He adds: "We find similar instances of the remission of jizyah in the case of Christians who served in the army or navy under the Turkish rule."<sup>97</sup>

e. It has become a common practice throughout history that any ruler would confer something on his citizen or even the alien in exchange, hence recognition, of valuable services performed by the

latter. The same treatment could be expected from a Caliph. Therefore, jizyah, among other things, could be remitted in exchange for invaluable services rendered by non-Muslim subjects to the state.

The historical evidences above were the practices of the Companions of the Prophet during their life times. According to Islam, they were the people who knew better the letter and spirit of Sharī'ah. Their ijtihad as well as judgements have become a hujjah (legal evidence) and a binding precedent for the Muslims to follow. The Examples above explicitly demonstrate that jizyah would be exempted from <sup>any</sup> dhimmī who fights with the Muslims or voluntarily joins the battle in defence of the Islamic state. We possess no knowledge to the contrary. There was no objection raised from the Companions of the Prophet when Sarāqah asked for approval from 'Umar I. Therefore, it has become a consensus in the time of the Companions of the Prophet. Now, it has become certain that jizyah could be waived when dhimmī takes up arms in defence <sup>of the</sup> dār al-Islām, or makes necessary preparations for it in terms of material or the like. For, defence does not only mean actual fighting in the battle-field but also the preparation for it.<sup>98</sup>

#### G. Jizyah Is Not a Poll-Tax.

Many modern writers,<sup>99</sup> particularly in works



published in Western languages, frequently used the term poll-tax to describe jizyah. The term seems inappropriate and <sup>is</sup> by no means equivalent to it. Consequently, it may lead to misconception of the concept of jizyah itself. For, its concept, objective and application are different from poll-tax as we have seen above. M. Walker in his definition of poll-tax says: "A tax of uniform amount on each individual or head. It has been levied several times in England, the first was in 1377.... Its use caused discontent in the United States and was declared unconstitutional by the 24th. Amendment (1964)."<sup>100</sup> It would now appear that poll-tax is levied on every head, man and woman alike, which is totally different from jizyah. For jizyah is only levied on able-bodied man as stated above in lieu of military service. It is a result of a contract ('aqd al-dhimmah) between a Muslim authority and the inhabitants concerned. Each party is free to accept or reject the agreement. Thus, an element of mutual consent exists therein.

On the other hand, poll-tax in the time of absolute monarchy was always a unilateral will, viz. imposed on the subjects. The tax collector has been an object of public fear, hatred and execration. At times, people revolt against the taxing power hence a civil war broke <sup>out</sup> inevitably. In the words of Walker "In the law of taxation justice has no place at all."<sup>101</sup>

Arnold adds that "This tax (jizyah) was not imposed on the Christians, as some would have us think, as a penalty for their refusal to accept a Muslim faith, but was paid by them in common with the other dhimmī or non-Muslim subjects of the state whose religion precluded them from serving in the army, in return for the protection secured for them by the arms of the Musalmans."<sup>102</sup> Tabarī reports that when the people of Ḥīrah contributed the sums agreed upon, they expressly mentioned that they paid this jizyah on condition that "The Muslims and their leader protect us from those who would oppress us, whether they be Muslims or others."<sup>103</sup>

It would now appear that jizyah from its concept and application was not necessarily a poll-tax. It was simply a tax, a protection tax or "a security tax" against internal as well as external attacks.<sup>104</sup> It is a financial obligation upon a dhimmī which is quite similar to that upon a Muslim in the form of zakāt, sadaqah and the like. Its nature, however, according to Majīd Khaddūrī, was more of a collective tribute rather than a poll-tax paid by each individual to the Muslim authorities.<sup>105</sup> Finally, Dennett has erred in asserting that both jizyah and kharāj were used in the sense of tax, for, as Khaddurī says, only kharāj, not jizyah, was used in the general sense of tax.<sup>106</sup>

#### H. Jizyah is not a Fundamental Law.

Having discussed jizyah in its literal, legal, and historical context, it is now pertinent to see whether the rule relating to jizyah is a substantive law. In another words whether it is a fundamental law that left no room, in terms of its application, for discretion or ijtihād, by the Muslim authority. We have seen earlier that jizyah was not the fabrication of Islam. But the system had been existed before the advent of Islam. It was practiced by the Jews, Greeks, Romans, Byzantines, and Persians. The first ever to introduce jizyah among the Persians was the King Anūshirwān (531-579 A.D.).<sup>107</sup> Therefore, jizyah was a sort of reciprocal treatment in conformity with the prevailing custom.

The first treaty concluded by the Prophet with the tribes of 'Aws, Khazraj and the Jews of Medina, later popular known as ṣaḥīfah al-Madīnah (Constitution of Medina), had made no provision of jizyah.<sup>108</sup> This treaty, it should be recalled, was continued to operate, even after the revelation of the verse of jizyah and the position of the Prophet was firmly establish in Medina. Similarly, the peace treaty (ṣulḥ) was also concluded by the Prophet with the pagans of Mecca in the year 6 A.H./627 A.D. known as the treaty of Ḥudaybiyyah.<sup>109</sup> In this treaty, there was no mention of jizyah. Another case in point is



that the agreement reached by 'Umar I with Banū Taghlib. In that agreement it was reported that the Caliph agreed to accept ṣadaqah rather than jizyah as insisted by Banū Taghlib.<sup>110</sup>

From the exposition of the historical facts above, we can say that jizyah is not a fundamental law which was required to be followed to the letter by Muslim authorities.<sup>111</sup> It follows that the Muslim authority has the prerogative to enter into any treaty which it deems fit and proper for the interest of the Islamic state. This is simply because the main objective of Islam, in its relation to non-Muslims, is to achieve a long lasting peace so that it could enable the Muslims to exercise the mission of da'wah (propagating Islam) freely.<sup>112</sup> Furthermore, in concluding the treaty, the jurists have agreed that the authority may conclude an absolute treaty with unspecific time period and without involving any payment or tribute to the Muslims. Some jurists would even agree to the extent that the Muslims are also allowed to sign a treaty stipulating that they make a payment to non-Muslim authority. This treaty, however, should be concluded in the time of necessity and that it should be a temporary measure (ṣulh mu'awqat).<sup>113</sup> This situation is just like the case of ransom to be paid to the captor. The similar incident was reported on the authority of 'Abd al-Wahhāb al-Thaqafī that the

Prophet was reported to have obtained the release of one of his Companions with two of his enemies.<sup>114</sup>

In conclusion, we can say that the Muslim authority is empowered to conclude a peace treaty with non-Muslims which is not based on paying jizyah. Such a treaty had been practiced by the Prophet and his Companions as has been discussed above.

#### I. Jizyah in the Contemporary Muslim Countries

At present as in the past, there are a substantial non-Muslim citizens in the contemporary Muslim countries. Their religions however are varied from Judaism, Christianity, to Hinduism, Buddhism and even animism covering the areas from Morocco to Indonesia. Most of this countries, at present, are not practising totally the Islamic rules.<sup>115</sup> Their laws and systems of government are based on their previous colonial regimes whether in the forms of either a British Common law system or a French-Italian-Dutch Civil law system with the exception of some adaptability to suit the local custom and needs. But the colonial roots and concepts remain intact.

With that prevailing situation, it is self-evident that the present Muslim governments do not treat non-Muslim citizens as dhimmis, hence no jizyah is prescribed on them. It is hard to determine, from constitutional point of view, whether those non-

Muslims are dhimmis since their presence in each respective countries, dated back from time immemorial. However, in some country like Malaysia, for instance, we know for sure that the Chinese and Indians were brought in by the British colonial in order to work as the blue collars workers in the tin minings and rubber estates. Legally speaking, to be considered as dhimmi there must be a formal contract concluded between the parties concerned. No such a contract had been made. At any rate, the only reasonable justification for not collecting jizyah from non-Muslim citizens, according to the theory of dhimmi, is that most Muslim countries have now made a compulsory military service on all its citizens, Muslim and non-Muslim alike. We have seen above that to render military service, will make the dhimmi liable for exemption of jizyah. As for those who do not serve a military service, for one reason or another, shall pay tax, a one uniform national tax<sup>116</sup> which equally imposed on all citizens. This state of affairs continues uninterrupted. The Islamic taxation so far has not been fully enforced by the government. Its application however depends solely on the conscientiousness of tax-payers.

Now, it has become an established fact that the non-Muslim citizens in the contemporary Muslim countries do not pay jizyah for reason of, inter alia, military service. This practice however, looking from



the theory of jizyah point of view, does not incompatible with Sharī'ah for reasons indicated above. Non-Muslim citizens, in fact, would be willing to defend their country, their family and their fellow citizens. They do not want to be discriminated in this respect. Furthermore, the motive of war and defence now has been for the national interest, or to be more specific, for the sake and pride of nation state that they live in rather than for the sake of God or jihād as it used to be. In the past, the burden of war, as we recalled, lies solely on the Muslims but not in the present time.<sup>117</sup>

#### J. Some Examples of Treaties

1. We have mentioned in the beginning of the discussion of jizyah that the Christians of Najrān received special treatment with regard to jizyah. They did not pay jizyah per se but a form of contribution was agreed upon in the treaty. We reproduce the text of the treaty here, a typical example, as follows:

In the name of Allāh, the Compassionate, the Merciful, this is [the pact] which has been issued by Muḥammad, the Apostle of Allāh, to the people of Najrān, to whom his authority shall extend—their fruit, their money and their slaves. All these are left to them except the payment of 2,000 uncial dresses (ḥulal al-awāqī), of which 1,000 to be paid in the month of Rajab and 1,000 in the month of Ṣafar together with an ounce of silver on each payment. If the produce exceeded, or became less than [the tribute], the latter will be estimated in proportion to the former. The people of

Najrān are expected to lend [the Muslims] shields, horses, animals and other objects. They must also entertain and provide supplies for my messengers for a maximum period of twenty days, but these must not be kept with them more than a month. If there were war in al-Yaman or in Ma'arra, they must supply clothes for thirty persons, thirty horses and thirty camels. If some of what was lent to my messengers had been destroyed or perished, [the people of Najrān] shall be compensated. They shall have the protection of Allāh and the promise of Muḥammad, the Apostle of Allāh, that they shall be secured their lives, property, lands, creed, those absent and those present, their families, their churches, and all that they possess. No bishop or monk shall be displaced from his parish or monastery and no priest shall be forced to abandon his priestly life. No hardships or humiliation shall be imposed on them nor shall their land be occupied by [our] army. Those who seek justice, shall have it: there will be no oppressors nor oppressed. Those who practice usury, shall seek no protection from me. No one shall be taken as responsible for the fault of another. For the continuation of this compact, the guarantee of Allāh and the assurance of Muḥammad, Apostle of Allāh, sanction what has been written until Allāh manifests His authority so long as [the people of Najrān] remain faithful and act in accordance with their obligations, giving no support to oppression. Done in the presence of the following witnesses: Abū Sufyān b. Ḥarb, Ghaylān b. 'Amr, Mālīk b. 'Awf of [the tribe of] Banū Naṣr, al-Aqra' b. Ḥābis al-Ḥanzalī, and al-Mughīrah b. Shu'bah. 'Abd Allāh b. Abū Bakr acted as secretary.<sup>118</sup>

The significance of this treaty, the first in a series of treaties between the Muslim and Christian authorities, lies in the form of tribute paid by non-Muslims. Apart from obligations that both parties have to performed, the treaty provides a clear and absolute



freedom of religion to the Najrān. They can seek justice from Muslims and no one would be held responsible for the wrong-doing of another.

2. Another treaty concluded by Khālīd b. al-Walīd with the Christians of Ḥīrah defining the nature of relationship between the two parties and the way how jizyah was based and collected. The text of the treaty is as follows:

In the name of Allāh, the Merciful, the Compassionate. This is the agreement between Khālīd b. al-Walīd and the people of Ḥīrah. The Caliph Abū Bakr has ordered me to proceed from Yamāmah to the people of Iraq—Arabs and Persians—to call them first to believe in Allāh and His Apostle and to promise them paradise [if they accepted Islam] and to warn them with the Fire [if they refuse]. If Islam is accepted, they shall have the same rights and obligations as the Muslims. I have arrived finally at Ḥīrah and met Iyās b. Qabīṣah al-Ṭā'ī with a few of the leaders of the city. I invited them to believe in Allāh and His Apostle, but they refused. I have therefore offered them either to accept jizyah or fighting. They replied: "We do not want to fight; we want peace with the same conditions as those accepted by other people of the Book, namely, the paying of jizyah." [I have accepted this] and counted them; they were seven thousand: one thousand of them of old age were exempted; those who have to pay the jizyah were six thousand. Our agreement was accordingly based on paying sixty thousand [dīnār].

It was therefore agreed that [the people of Ḥīrah] will not violate their compact; that they shall not support an unbeliever against an Arab or Persian Muslim, and that they shall not pass on any intelligence to them.... If any of their men become weak and old, or inflicted with a disease, or was rich and had become poor, the jizyah shall be lifted from him and he and his family shall be supported by the Public



Treasury [bayt māl al-muslimīn] so long as he resides in dār al-Islām. If they [the men] leave the dār al-Islām, their families shall not be supported by the Muslims. If any of their slaves adopts Islam, they are to be sold with the highest possible price and paid to their [Scripturary] masters. They the [the Scripturaries] shall have the rights to wear any kind of clothes save military uniforms, provided their clothes shall not be similar to those of the Muslims. If any one of them is found to wear a uniform, he is to be arrested and to give reasons for so doing; if [his answer is unsatisfactory] he is to be punished by a fine equivalent to the price of his uniform. It was agreed that their payment [of the jizyah] shall be made to the Public Treasury; if they ever need support, it is to be given from that Treasury.<sup>119</sup>

This instrument provides us with a couple of rules and regulations as to the relationship between the two parties. It was agreed that the Christians would have to pay jizyah in a collective form rather than on an individual basis. So there was no sense of poll-tax therein. Although it is based on the number of able-bodied men, there was no extra tax imposed either in the form of kharāj or the like. Non-Muslims also were allowed to wear any dress except a military uniform or that similar to one of a Muslim. As to the military uniform it has become a common rule today that no uniform, particularly a military uniform, could be worn by any civilian. Therefore, the imposition on non-Muslims in this respect is a matter of administration rather than bearing any legal implication. Moreover, according to the treaty the

non-Muslims can preserve and maintain their cultural identity against absorption and assimilation with the Muslim community. For, Islam did not emerge to annihilate cultural identity of any ethnic group of non-Muslims so long as they remained outside the realm of Islam. This has been the attitude of the Muslims and its phenomenon can be seen even in the Muslim countries today.

The treaty also provides that non-Muslims must not help the enemies of Muslim army including espionage for them. For passing information, in the military sense, would mean an act of treason which would jeopardise the treaty. The Christians, on the other hand, have an equal footing with the Muslims in having a social security from a Public Treasury in case they need the support.

3. In the time of 'Umar I, the Patriarch of Jerusalem demanded that the treaty of Jerusalem should be signed by the Caliph himself rather than by his representative. The Caliph agreed and came to Jerusalem to sign the treaty.<sup>120</sup> The text of the treaty follows:

In the name of Allāh, the Compassionate,  
the Merciful;

This is what the servant of God 'Umar,  
Commander of the Believers, has guaranteed  
to the people of Iliyā' [Jerusalem];

He guaranteed their lives, property,  
churches and crosses....

Their churches will not be dwelt in [by  
foreigners], nor will they be destroyed or  
ruined in any part. Nor will their crosses



or property [be destroyed];  
 They will not be persecuted for their religion, nor will they be molested;  
 Jews shall not be allowed to live with them in Iliyā';  
 The inhabitants of Iliyā' shall pay the jizyah as much as the inhabitants of Madā'in;  
 They shall require the Rūm [Byzantines] and the thieves to leave the city. If they leave, they shall be secure in their lives and property until they reach [the city]. Those [Byzantines] who prefer to stay, shall be given security and should accept the same obligations as those of the inhabitants of Iliyā' concerning the jizyah. Those who prefer to go with the Rūm from among the inhabitants of Iliyā' shall be secure in their lives and property, [provided] they leave their churches and crosses....  
 Those who were in it [the city] from among the people of the land [farmers?], before the death of so-and-so shall be allowed, if they wish, to stay in the city and shall have the same obligations as those of the inhabitants of Iliyā' concerning the jizyah. Those who prefer to leave with the Rūm, [may do so]; those who prefer to go to their people [their land], [may do so] until the time of their harvest;  
 This document is guaranteed by the Assurance of Allāh, of His Apostle, of the Caliphs and of the believers, if [the inhabitants] paid their duties of the jizyah;  
 Witnesses are: Khālīd b. al-Walīd, 'Amr b. al-'Āṣ, 'Abd al-Raḥmān b. 'Awf, and Mu'āwiyah b. Abī Sufyān.  
 It was written in 15 A.H.<sup>121</sup>

The foregoing treaty as has been seen above contains the nature of pledge or guarantees given by the Muslim authority to non-Muslim community. The treaty speaks more clearly in terms of religious freedom and preserving its institutions. With respect to rights and obligations, the Byzantines were treated



equally with the inhabitants of Jerusalem if they chose to stay. Hence, it is a form of a constitutional guarantees offered by the Muslims to them. However, this treaty, although negotiated and signed like others, has two characteristics which make it different from others. First, it is designed to be a perpetual pact, for as it will be recalled, the contract of dhimmah is meant for a permanent one until there is an act, from the other party, which could be construed as otherwise. Second, from the moment the treaty came into force, the dhimmī became subjects of the Islamic state and their territory part of dār al-Islām.<sup>122</sup>

Finally, the jurists advise the Muslims, at all levels, to regard their treaties, agreements, or even promises as religious obligations, binding at all times, and should be strictly observed.<sup>123</sup> This is in conjunction with the commands of the Qur'ān which frequently urges the Muslims to respect and fulfil their promises irrespective of the religious backgrounds of the people.<sup>124</sup>

## II. Kharāj (Land Tax)

### A. Basic Notion of Kharāj

At the outset we would like to state our position clearly that kharāj<sup>1</sup> is a land tax. It should not be confused with some other formes of taxes in the Islamic fiscal system such as ‘ushr, fay’, zakāt (on land products) and the like. In this study, the term kharāj will always be used in its specific sense of land tax. In the mean time, we have observed that the Qur’ān uses the term kharāj in the sense of tribute, wage or reward.<sup>2</sup> So it is a Qur’ānic term and it has its own significance in the development of Islamic law.

According to the jurists, kharāj has two distinctive meanings: general and specific. The former is general inland revenues that the government receives regularly from various sources in the Islamic state such as zakāt, ‘ushr, jizyah, etc. whereas the latter is that kind of specific tax which is imposed by the authority on the kharāj land. It is for this reason perhaps Māwardī . . . defines kharāj as something that is imposed on land which has to be fulfilled.<sup>3</sup> As for a land to be considered or categorize as kharāj land it must be, at initial stage and primarily, a “conquered land” which the imām decided not to divide among the warriors but retained in the hands of the original owners for cultivation.

In return, the tenant has to pay kharāj (tax), for the sum agreed upon, to the Muslim Authority. The title to the land, however, is alienable with its burden to any person without prejudice to one's religious background. For kharāj is precisely based on the nature of the land not the person. It follows that the new tenant would continue to pay kharāj even after the conversion to Islam or even if he is a Muslim.<sup>4</sup>

#### B. The Genesis of Kharāj

As in the case of jizyah, kharāj also was not the product of Islam. It had existed and been exercised by several nations prior to the advent of Islam. It is for this reason, perhaps, some writers claimed that the term kharāj is not Arabic, but it derived, via Syriac, from Greek.<sup>5</sup> Both historians as well as jurists report that kharāj was, in fact, a common practice of the regimes over their conquered territories in the east and the west alike. Yaḥyā b. Ādam (d.203/818) on the authority of Ḥasan b. Ṣāliḥ (d.167/783) said: "As to our Sawād, we heard, was in the hands of the Nabaṭ, who had been subjugated by the Persians to whom they paid Kharāj. The Muslims, when they defeated the Persian, left Sawād and those of the Nabaṭ and Diḥqān who had not fought the Muslims, in the same position; they imposed jizyah, surveyed the land in their possession and charged kharāj on it. Any



land not possessed by anyone was seized as safāwī (state's land)<sup>6</sup> of the imām.<sup>7</sup> In like manner, Ibn al-Athīr has a similar report. But his account was rather more specific on the method of collecting kharāj. He said that the Persian kings before Anūshirwān had levied kharāj on the product of its territory in many ways; namely, one-third, one-fourth, one-fifth and one-sixth, depending on its irrigation and prosperity.<sup>8</sup> It is reported that the Byzantine empire depended largely on land tax. The farmers in the Byzantine reign had to pay land tax both in kind and in cash.<sup>9</sup> These accounts, reflect a general understanding that the regimes would impose a land tax as a main source of its revenues both either for administration or for maintaining expenditure or for vested interests at the expense of tax payers.

It was under these circumstances that Islam evolved with its land tax. But the historical development which gave rise to kharāj is interesting. In the time of the Prophet and his first Caliph, Abū Bakr, whenever the Muslims captured the lands, that is part of ghanimah, the practice had been that the land would be divided among the warriors. Each would have his own share depending on the degrees of his participation and contribution to the battle; i.e. the horse or camel rider would be allocated more than the foot soldier unless he voluntarily waived his greater

shares.

In the time of 'Umar I, however, when Muslims took over Iraq (sawād)<sup>10</sup>, the land of fertile crescent, and its vicinity, the soldiers wanted to have their share of the land. But 'Umar I, as a responsible Caliph and a man of vision, did not like the idea. Instead he made it belong to the entire community (ummah) and whoever cultivated it should pay tax (kharāj); apart from zakāt on the products in case of the cultivator being a Muslim. His suggestion however, at the outset, created discord among the Companions of the Prophet. Finally, 'Umar I managed to convince them after a prolong consultation. This conflict of opinions and discussions is recorded by many historians, jurists as well as in many literary works. Of these, we shall reproduce a full account by Abū Yusūf:

He ('Umar) also consulted them (the Companions of the Prophet) about the distribution of the lands of Iraq and Syria, which God had bestowed on the Muslims. Some were of the opinion that the land should be distributed. To them 'Umar said: What about the future generations of Muslims who will find that all the lands with the tenants on them are already distributed, occupied and inherited? No, this is not good advice. When 'Abd al-Rahmān b. 'Awf asked: Are not the lands with their tenants part of what God has bestowed on us? 'Umar replied: Yes, but I do not see it from this angle. By God! It may be that after me there will be no more great conquests or perhaps such as will be only a burden. If I distribute now the lands of Iraq and Syria with their tenants, who will sustain the frontier settlements? And who will care for the children and widows of Iraq and Syria? Those in favour



of distribution, however insisted and asked: Do you want to create a trust of what God bestowed on us for fighting with our swords, in favour of people who did not participate in the war and were not present at the battles, and in favour of their children and grandchildren? When 'Umar did not change his mind they asked him to consult the early Emigrants. 'Abd al-Rahmān b. 'Awf was of the opinion that the lands should be distributed but 'Uthmān, 'Alī, Ṭalḥah and Ibn 'Umar agreed with 'Umar. He then sent for ten of the Companions (al-anṣār) five from the tribe of al-'Aws and five from al-Khazraj, from among the oldest and noblest of them. When they came he said to them: I troubled you to come because I want you to share with me the responsibility of administering your affairs. I am one of you and you are here to declare justly what your opinion is, be it against me or with me, as I want you to be objective. You have God's book speaking the truth and by God I want only justice and truth. There are those people who accuse me that I want unjustly to deprive them of their rights. May God protect me from depriving someone of what belongs to him by giving it to another. This would make me very miserable. However, I think that there is nothing more to capture after the Persians lands and their tenants. I have distributed the movable spoils of war amongst those entitled to them after deducting the fifth and allotting it where it belongs. I thought, however, that I should not distribute the lands with their tenants, but rather leave them as a trust and impose on the lands the kharāj tax and on the men the jizyah to constitute a permanent income for the Muslim soldiers, their children and future generations. Do you not think that the frontier settlements need soldiers in their garrison, or that places like Syria, al-Jazīrah, al-Kūfah, al-Basrah and Egypt need not troops in their barracks? From where will all those troops get their pay if we distribute the lands with their tenants? Thereupon they (Companions) said: You are right! If all the frontier settlements and those places are not provided with troops and their needs, the enemy will recapture them. 'Umar then asked them to propose someone of sound



judgement and intelligence for the task of organizing a survey of the lands and their tenants. When they agreed on 'Uthmān b. Ḥunayf<sup>11</sup> as a man of vision, brain and experience, he was sent to survey the lands of al-Sawād....<sup>12</sup>

### C. Legal Basis of Kharāj

From the consultation of 'Umar I with some Companions of the Prophet and thereafter led to their agreement, we can say that kharāj was initially the decision and ijtihād of 'Umar I. Since his ijtihād has been approved and agreed by the Companions of the Prophet, with the exception of a few Companions such as Bilāl and 'Abd al-Rahmān b. 'Awf, 'Umar I therefore has set aside the existing practice of distributing the conquered lands among the soldiers. Apart from a collective decision in the case of kharāj, the Caliph also set a new precedence regarding the conquered lands which ever since constitutes a clear policy for subsequent Muslim rulers to deal with the lands acquired by force. This sort of land reforms however, is not without legal basis. In fact, the concept of kharāj is manifest in the interest (maṣlahah) of the ummah as well as ijmā' (consensus).

#### 1. Public Interests (Maṣlahah)

In Islamic legal theory, the head of state, in the course of resolving the issues before him, the

interest of the public outweighs individual's interest. It could be said therefore that Islamic law, theoretically speaking tends to favour public rather than individual interests. This tendency however should not be understood as the will of majority always prevails. It is precisely under this principle that make 'Umar I reluctant to divide Sawād land. He was in the opinion that it is a matter of interests of the ummah, especially later generations, not to distribute the lands among the fighters. The interests can be enumerated as follows:

a. Guarantee Regular Income

'Umar foresaw the future generations would probably facing difficulty in running and maintaining governmental agencies without having a regular flow of income in the State Treasury (Bayt-al Māl). Some Muslims would even be deprived of their rights to living should the conquered lands be distributed. Therefore, kharāj certainly could answer the foreseeable problems. This rationale can be seen from 'Umar's words "What about the future generations of Muslims who will find that all the lands with its tenants on them are already distributed, occupied and inherited? No, this is not a good advice."<sup>13</sup>

It is natural that with the expansion of new territories there would be, certainly, more respon-

sibilities and more burdens to be reckoned with. At times, while dealing with those predicaments, the authority would encounter with a serious financial problem if all those lands had been distributed; hence no regular income from those lands for the state. It deems therefore vital for the state in order to run its machinery and to defend its territories to have a regular income from those lands in the form of kharāj and the like as 'Umar has said while defending his position, "If I distribute now the lands of Iraq and Syria with their tenants, who will sustain the frontier settlements? And who will care for the children and widows of Iraq and Syria?"<sup>14</sup> Indeed, guarding the frontiers, offering security for the youngsters and planting hopes for the widows and others are vital interests (maṣlahah) of the ummah. For the survival of the ummah mainly depends on the integrity of the society. There can be no integrity of the society if there is one or two groups in the society had been ignored and deprived of their rights.

There is a report attributed to 'Umar I that he says: "If it is not for later generations, I would distribute every town (place) that I have conquered as the Prophet had done to khaybar. But I would rather leave it as a treasure so that they can share it."<sup>15</sup>

When 'Amr conquered Egypt, al-Zubayr demanded that the lands be distributed,<sup>16</sup> 'Amr refused to distribute



until he received an instruction from the Caliph 'Umar I, the Caliph says leave it as it is. Abū 'Ubayd comments that 'Umar wanted it to be a trust for the Muslims to be inherited from generation to generation so that it becomes a source of strength for them.<sup>17</sup>

b. Distribution of Wealth to All Sectors

It seems to be that if the practice of distributing the conquered lands continues, the wealth would circulate among a limited few, who have a means to join the battle, hence it would create a wealthy group, though it is not against the Islamic teachings, in the community;<sup>18</sup> whereas those who do not join the battle or who came later would remain in hardship. This situation would be seen as unhealthy especially in the community which is still in the forming stage. Such a situation would also be incompatible with the spirit of the Qur'ān which says:

That which Allāh giveth as spoil unto His messenger from the people of the townships, it is for Allāh and his messenger and for the near of kin and the orphans and the needy and the wayfarer, that it become not a commodity (circuit) between the rich among you.<sup>19</sup>

It was also fear that if the distribution continues, it would corrupt and deviate the motivation of the Muslims in fighting to seek material gains rather than for the specific course.

Abū 'Ubayd reports that when Mu'ādh b. Jabal sees

some Companions keep asking 'Umar to distribute the lands he says to 'Umar: "By God! then it would happen what we do not like. If you divide the lands, it incomes (benefits) will fall in the hands of a few. Then later people come, who would need some help, but find nothing. Therefore, look for an alternative that would accord both the first and the later generations." <sup>20</sup>

### c. Continuous Cultivation of the Lands

It is the intention of 'Umar I in his decision of kharāj that the lands should remain in constant used, be it cultivated or otherwise, by its previous owners. This is because, generally speaking, its owners would be more experience and efficient in manipulating it as 'Umar I says: "They would be land's developers, they have more experience and more energetic." <sup>21</sup> For being the owners, they know the lands better in terms of its soil, fertility and suitability to grow a crop on it.

At any rate, the question of land exploitation should be dealt with in a separate subject. But suffice it to say here that in Islam one should exploit his lands at its maximum. It falls under a broad concept of al-tashkīr (subserving) and istikhlāf (viceroys) that God has given it to mankind. <sup>22</sup> It is pertinent that every man should use his land by all means available to him. There should

be no excuse for not using it under the pretext of busy with some other engagements or lack of experience or the like. This is true even using the expertise and facilities of non-Muslims.

When the Prophet conquered Khaybar, there was not enough man power to exploit the lands. The Prophet handed it over to non-Muslims to use. The cultivators receive half of its crops.<sup>23</sup> 'Umar therefore followed the same policy in leaving the lands under its previous owners for cultivation but he charged them kharāj.

So far we have seen the elements of public interests in the implementation of kharāj both for Islam and Muslims, viz. a regular flow of incomes to the Public Treasury to be spent for the Muslim community, i.e. preparation for the army, defence the borders, building infrastructure and realization of the concept of takāful ijtīmā'ī (mutual or joint responsibility). It also manifests in a fair distribution of wealth in the society so that the wealth can be enjoyed by all, at all times, and finally, the lands in question continued to be exploited by the experts without interruption. It is one way of contributing to a state and society at one time.

Moreover, Abū Yūsuf himself explains those interests as follows: " 'Umar's decision not to



distribute the lands amongst those who captured it was guided by God from what is written in His Book. It was of benefit to all Muslims. His decision in collecting kharāj and distributing it amongst the Muslims was of a general interests for the public. For, had it not been for making a trust to be used for the payments of pensions and wages, there would be no troops in the frontier settlements, no sufficient armies to march for jihād, and no security against the recapture of their towns by the armies. But God knows best."<sup>24</sup>

## 2. Consensus (Ijmāʿ)

As we all aware that ijmāʿ is one of the main sources of Islamic law after the Qur'ān and the sunnah. It operates in the form of ijtihad, initially, by individual scholar or groups of scholars on certain legal issues. If that issue, which had been agreed upon, has no disagreement from another authority, it could be said that the issue in question enjoys a consensus from the community. In short, consensus means a unanimous opinions of the scholars on certain legal issues at any given time.<sup>25</sup> It should be noted that the issue in question must be the subject of ijtihad, that is to say, it is absent from the text of the Qur'ān and the Tradition and it had not been resolved before.

Bearing those points in mind, it is obvious that

kharāj had never been the subject of ijtihād. It was the idea of 'Umar I. as has been pointed out earlier. When 'Umar forwarded his arguments, he managed to direct the attention of the Companions to his standpoint on certain aspects of public interests (maslahah) from the implementation of kharāj. As a result, all Companions including those who opposed him, unanimously said, "The decision is yours, well judged! If all the frontier settlements and those places are not provided with troops and their needs, the enemy will capture them."<sup>26</sup> It was an explicit support from the Companions including those who disagreed with him. Therefore, legally speaking, the legislation of kharāj enjoys a consensus of the Companions of the Prophet.

From what has been discussed above, we can conclude that the legislation of kharāj, in the time of 'Umar, has its legal basis from the public interests and consensus. So the decision was not foreign to the principle of Islamic law. One may rightly ask however as to whether the act of 'Umar would not conflict with the practice (sunnah) or well established principle set by the Prophet and had been properly followed by his first Caliph.<sup>27</sup> This legal question should be construed thoroughly in the light of the socio-political economy of the time. According to Islamic legal theory the ruler has the power to

amend the rule in accordance with the public interests or to prevent the harm to society so long as it does not conflict with the general principles of the law. It falls under the general principle of taghayyur al-ahkām tab‘an li taghayyur al-maṣlahah (changing the rules [law] in accordance with the changing of the interest).<sup>28</sup> In so doing, the jurists thus formulated a legal maxim such as "The act of imām (for the people) dependent on maṣlahah (interest).<sup>29</sup> The case in point, ‘Umar I as a ruler was of the opinion that public interests in his times requires that the frontiers, the orphans, and the widows should have the priorities and centres of attention from the state rather than the fighters who perhaps already received some fortunes from elsewhere. It was probable that those priorities were not immediate in the times of the Prophet as the community was not so complex and the borders were not so immense. But those situations have changed in the time of ‘Umar I. All these considerations, inter alia, contributed to ‘Umar's decision.

Although the theory above is correct and applicable to kharāj, it seems that ‘Umar's decision has its legal basis from the sources of Islamic law as has been elaborated earlier. Therefore the decision of kharāj was not an application of the rule of changing the rules [law] under the changing of maṣlahah



(times).

On the other hand, al-Ghazālī (d. 505/1111), a Shāfi'ī jurist, invoked the legal principle of public interests (al-masāliḥ al-mursalah) as a legal basis for the legislation of kharāj.<sup>30</sup> This technical term connotes to the needs and general interests of the public, at any given time, where no specific injunctions could be derived from both the Qur'ān and the sunnah. But social needs and the interests of the ummah require the need for such an injunction.<sup>31</sup> Thereafter, al-Shāṭibī (d. 790/1388), a Mālikī jurist, held the same view as Ghazālī's and accepted the legislation of kharāj as an instance of the application of the principle of discretionary interests.<sup>32</sup> It is on the basis of this legal principle that the imām has the authority to levy any new tax within the bounds of the interests of the Muslim community, hence kharāj is an instance of this general rule. The payment of such taxes was regarded as obligatory just as were the basic fiscal duties laid down by the Qur'ān and the sunnah. Therefore, some contemporary Muslim jurists divide Islamic fiscal obligations into two categories; namely the Divine obligations (wāḥibāt ilāhiyyah) and discretionary obligations (wāḥibāt ijtihādiyyah). While kharāj represents the latter, ushr was regarded as an instance of the former.<sup>33</sup> It should be noted here that

there are substantial differences between the two categories because unlike discretionary duties, the Divine duties entail the elements of worship and devotion. Thus, non-Muslims are not expected to perform those duties.

#### D. Classification of Lands in Respect of Kharāj.

According to Ibn Qayyim al-Jawziyyah, there are six categories of lands in respect of the rule of kharāj:<sup>34</sup>

1. Land which the Muslims revive it (iḥyā' ahā), after it had been uncultivated and "dead", and bring it to life by an active use of it. In juristic sense, this means that the employment of some efforts in order to make the unused lands become active lands; thus acquiring propriety rights over it.<sup>35</sup> The revived land is to be classified as 'ushr land. Therefore, no kharāj (tax) would be levied on it. This is the opinions of all schools;<sup>36</sup>

2. Land whose owner voluntarily converts to Islam without using force. In this case, the ownership to the land is continue to be vested in him. There is also no kharāj but 'ushr would be collected from him since the Muslim pays 'ushr as a form of zakāt. This is the case of land ownership in Medina, Yemen, Ṭāif etc. after the conversion of their owners.<sup>37</sup> Māwardī says that this category, according to Shāfi'ī school,

was regarded as ‘ushr lands and no kharāj could be imposed on it. But Abū Ḥanīfah held that the imām still can decide whether to classify as kharāj or ‘ushr. Once he decides it to be kharāj, it could never be changed to ‘ushr again. But the ‘ushr is always changeable to kharāj; <sup>38</sup>

3. Land which is acquired from non-Muslims by force (‘anwatan wa qahran). There are two opinions regarding this category. <sup>39</sup> One says that this land has become ghanimah (spoils of war). Therefore, it should be divided among the fighters as in the case of movable properties. The status of the land itself however is ‘ushr proper not kharāj. It is just the land in the first category. <sup>40</sup> On the contrary, the other opinion held that the imām has the right to choose (khiyār). He can either divide it hence, the land become ‘ushr not kharāj; or he can also make it as a trust and charges kharāj on it. In this case, kharāj is considered as a rent for an unspecific period (of times). The land would be ‘ushr and kharāj at the same time, <sup>41</sup> namely, if it continues under non-Muslim hands, it would be liable for kharāj not ‘ushr regardless of whether he exploits the land or not. If he converts to Islam, kharāj still continues to be charged, and ‘ushr would also be added. Thus, kharāj and ‘ushr would meet at the same time, on the same person, for two different reasons: the nature of



the land and being a Muslim. This is the majority view. On the other hand, Abū Ḥanīfah maintains that kharāj and ‘ushr could not meet at the same time. It must be either one.<sup>42</sup> Ibn Qayyim says that this opinion apparently influenced by the false (bāṭil) Tradition which says that, "There will be no kharāj and ‘ushr at one time;"<sup>43</sup>

4. Land on which non-Muslims have made a peace agreement with Muslims. By virtue of the agreement, the land continues to be under non-Muslims possession in exchange for kharāj. This kharāj is, in fact, jizyah. This tax would be exempted should the proprietors become Muslims. However, the proprietor is at liberty to sell or lease together with its burden. The case will be different if the new buyer is a Muslim;<sup>44</sup>

5. Land whose owners fled without fighting. The rule of ‘anwatan would be applied to this land, that is to say, it becomes waqf (not to be distributed) and kharāj would be imposed on it. The status of land would never be changed whether it then falls under the hands of Muslims or non-Muslims. The imposed kharāj is regarded as rent. According to Aḥmad b. Ḥanbal this category is fay';<sup>45</sup> and

6. Land whose owners have transferred its title to the Muslims in the agreement. But the land is still in the hands of its previous owners for use and they pay

kharāj from it. It is just like the case of the land that its owners have fled away, i.e. the rule of ‘anwatan is also applicable here. Conversion does not affect its status. The lease-holder, however, is alienable but not the title, so the new holder has the right to use it as he deems fit and proper. If the holder has become a dhimmī, he then would pay jizyah and kharāj respectively.<sup>46</sup>

#### E. Category of Kharāj

There are two kinds of kharāj:

##### 1. Kharāj wazīfah (Kharāj on Land and Produce)

This is the kind that the authority imposed in respect of the size of the lands and the kind of crops (product) from the individual piece of land. The tax becomes obligatory on the land holder after the land had been made available to him even though he does not actually cultivate it. This is because the land was under his disposal. The fact that he leaves the land idle is not an excuse for not paying kharāj. This is what ‘Umar I had done to the land of al-sawād in Iraq. He left the land to its previous owners and charged for every jarīb<sup>47</sup> of fertile land one qafīz of the crops grown and one dirham, for every jarīb of cucumber (or vegetables) five dirhams, and for every jarīb of vineyard (grapes) ten dirhams. It is reported that not a single Companion of the Prophet voiced his

disagreement when 'Umar charged these rates of kharāj.<sup>48</sup>

## 2. Kharāj al-Muqāsamah (the Proportionate Kharāj)

This kind of kharāj is levied on the proportional production of the land. For instance, it may be charged one-fourth, one-fifth, one-sixth or the like.<sup>49</sup> This means that the rate of kharāj depends solely on the productivity of the lands itself. If the lands could not be used for reasons of war, flood, drought etc., the holder is not required to pay any kharāj. At this point, it differs from wazīfah in the sense that the latter its kharāj becomes mandatory when the land was made available to him regardless whether he cultivates the land or not. It was this kind of kharāj that the Prophet concluded with the people of Khaybar.<sup>50</sup> While kharāj al-wafizah is only collected once a year, al-muqāsamah may well be collected several times a year depending on the frequencies of the crops and its seasons. It should be noted here that kharāj may be paid in kind or in value as in the case of jizyah.

## F. Is the Rate of Kharāj Changeable?

Shāfi'ī and Ḥanbalī jurists held that the rate of kharāj to be charged on the lands is subject to imām's decision and his ijtihād.<sup>51</sup> It is by no means could be



fixed a standard rate for all cases; rather, it varied from region to region depending on the condition of the land in question. It follows that the Muslim authority does not have to stick to what 'Umar I had charged in his time. It may be increased or decreased. All it needs to do is to see the "potentiality and capability" of the lands to bear kharāj as 'Umar I did to Iraq and others. This position is supported by the reports that when Ḥudhayfah b. al-Yamān and 'Uthmān b. Ḥunayf conducted a survey of al-sawād and charged the amount of kharāj on 'Umar's order, the Caliph asked them: "Perhaps you charged it more than it could bear?" They said: "No, we just charged it according to its capacity."<sup>52</sup> This means that the amount of kharāj to be charged is based on its capability.

At any rate, before deciding the rate, the authority should always bear in mind several factors, to mention a few, the fertility of the land, the kinds of crops grown, a pro rata increase in prices, a cost of production, means of irrigation, whether the land is easily reached, the distance from town and market etc. These are factors, inter-alia, that the authority should take into consideration in the course of charging kharāj.<sup>53</sup> The authority also, in imposing kharāj, should overlook the lease-holder's socio-religious backgrounds. For, those elements should play no part in imposing kharāj regardless of whether the

holders are Muslims or non-Muslims, friends or foes. The rule is therefore consistency and just to all.

It could be concluded therefore that the rate of kharāj is changeable. It is the subject of imām's decision whether to increase or decrease it depending on the capability (al-ṭāqah) of the land in question. Abū Yūsuf in upholding this position says that when 'Umar I imposed kharāj he did not say that this is what 'Umar charged kharāj to the people of kharāj, the amount is fixed for them, thus neither 'Umar nor the Caliph after 'Umar can increase or decrease it.<sup>54</sup> It seems that since the rate of kharāj is determined on the basis of the capability of the land itself, it is logical therefore that the more the land is capable the higher the amount of kharāj is and vice versa.

#### G. Conversion and Kharāj

We have pointed out earlier that kharāj is collected from the owner of the land whether the owner is a man, a woman or a minor. At this point, kharāj is rather different from jizyah. For kharāj is simply a tax on land not on the person per se as in the case of jizyah. It is a tax on active and cultivated land regardless of who the entrepreneur is. When 'Umar I introduced kharāj, he charged it on all owners.<sup>55</sup> If the land has been used for a dwelling place, that portion of the land would not be charged kharāj. This

is the position of Māwardī<sup>56</sup> and it is in line with the act of 'Umar I when he only collected kharāj from the cultivated land and exempted it from the dwelling spaces of a dhimmī.<sup>57</sup>

As regards the owner becoming Muslim, the jurists are not in agreement. Ḥanafī jurists held that the conversion of the owner has no effect on paying kharāj. By contrast, Mālik contended that kharāj should be exempted. He maintained that kharāj is just like jizyah which would be exempted by conversion. But Ḥanafī jurists argued that kharāj is imposed initially on the product of cultivated land, as in the case of 'ushr. The fact that he becomes a Muslim will not change the original status of the land. This position is supported by the report that 'Abd Allāh b. Mas'ūd, al-Ḥasan b. 'Alī, and Shurayḥ paid kharāj from their lands in Iraq.<sup>58</sup> It seems that Shāfi'ī holds the same view as the Ḥanafīs.<sup>59</sup> The same opinion was expressed by Ḥanbalite jurists.<sup>60</sup> It seems that this position is more relevant to the spirit of kharāj. It can not be compared with jizyah as has been contended by Mālik. For, kharāj is, in fact, a fiscal tax on land which had been conquered by force. The kharāj paid by the entrepreneurs, however, should be treated as rent notwithstanding that it has substantial differences with the law of rent (al-ijārah) in Islamic law.<sup>61</sup> It should be borne in mind that religious differences has



nothing to do with paying rent.

To support the above view there are several reports pertaining to the point. For instance, Yaḥyā b. Ādam records that in the time of ʿUmar I a man came and said to him: "I have turned Muslim, could you relieve me from paying kharāj?" ʿUmar replied: "Your land had been taken by force."<sup>62</sup> This means that the criterion is the manner by which the land was acquired not by the faith of the people. It was reported that ʿAlī had taken the same position when he was approached for the same purpose.<sup>63</sup> ʿAlī says to those who have turned Muslims: "If you keep your lands you should pay what you used to pay otherwise we will take the lands from you."<sup>64</sup>

Another disagreement arises among the jurists as to whether a kharāj-payer, after becoming a Muslim, or even a Muslim who cultivates kharāj-land, should also pay, in addition to kharāj, ʿushr (tithe). Abū Ḥanīfah and his Companions contended that there should be no double tax levied on the same land. It follows that if a Muslim cultivates kharāj-land, he should only pay kharāj and no ʿushr would be imposed on him from the crops.<sup>65</sup> But the majority of jurists, such as Mālik, Thawrī, Awzāʿī, Shāfiʿī, and Abū Thawr maintain that he should pay both kharāj and ʿushr.<sup>66</sup> There should be no confusion between the two taxes; this is because kharāj is a tax on the specific land, for its own

nature, whereas ‘ushr is a ṣadaqah (a kind of zakāt). Under no circumstances would the Muslim be exempted from zakāt. It is a religious duty as well as the “financial worship” (‘ibādah māliyyah). In upholding the majority's opinion, Abū ‘Ubayd says that it was alleged that both ‘Umar I and ‘Alī did not mention about ‘ushr when the Dihqān (people of sawad) embraced Islam.<sup>67</sup> The fact that ‘Umar I and ‘Alī did not mention it, according to Abū ‘Ubayd, is not sufficient to suggest that ‘ushr was precluded from them. For, ‘ushr is well established rule and it is an obligatory on every individual Muslim except when one does not meet its requirements. This principle is widely understood and self-explanatory. When the Prophet says: “Whoever revives dead land, it would belong to him.”<sup>68</sup> The Prophet also did not mention “provided that he pays ‘ushr.” Taking the meaning of that Tradition, no authority rejects the ‘ushr over that case, says Abū ‘Ubayd.<sup>69</sup>

Finally, we can conclude that the conversion of dhimmī to Islam does not exempt him from paying kharāj provided that the land under his possession is of kharāj in nature. The conversion also would entail double taxation on the same person over the same land. This rule also applies to Muslims who cultivate kharāj-land.

#### H. Expenditure of Kharāj Revenues

In terms of expenditure, the jurists have not set a clear demarcation line between kharāj and fay' as in the case of fay' zakāt and ghanimah.<sup>70</sup> For the expenditure of fay' is totally subject to, with due regards to the prescribed shares in the Qur'ān, the personal legal judgements of imām provided that the decision is for the interests of the community according to its scale of priorities. As for zakāt it is to be expended according to the prescription of the verse of ṣadaqah (alms-giving) which reads: "The alms are only for the poor and the needy,<sup>71</sup> and those who collect them, and those whose hearts are to be reconciled,<sup>72</sup> and to free the captives and the debtors, and for the cause of God, and (for) the wayfarers; a duty imposed by God. God is Knower and Wise."<sup>73</sup> As for the expenditure of kharāj, according to the prevailing view, it should be used on the common interests of the Muslim community such as:

1. The strengthening of the religious activities (imārah al-dīn), i.e. building the mosques, and other religious institution, commanding goods and forbidding evils;

2. The strengthening of the army and the protection of the frontiers;

3. Paying the salaries of the government officials, the army, judges, jurist-consults, and



collector of kharāj;

4. Building infrastructures viz. roads, bridges, dams, and restitution of rivers;

5. Pensions for judges and those who in charge of religious functions; and

6. Any expenditure that the imām deems fit and proper according to the exigencies of the times.<sup>74</sup>

According to Awzā'ī (d.157/773), the early jurist of Syria, 'Umar I and the Companions of the Prophet have made fay' and kharāj for the sole use of the army. So it became the established precedent for subsequent rulers.<sup>75</sup> Some Ḥanbalī jurists however held that kharāj is to be expended as fay'. In other words, it is for the Muslims rich and poor alike. It appears that this is also the position of al-Ḥasan b. Ṣāliḥ and Shāfi'ī.<sup>76</sup> It is clear therefore that kharāj revenues are to be expended for the interests of the Muslim community. As for the means and ways of expending it, it is agreed that it should rest on the discretionary power of the imām in accordance with his personal legal judgement (iṭihād). Since the decision to apply the rule of kharāj itself belonged to him, so it is appropriate and logical therefore that the decision to use kharāj revenues should also belong to him.

## I. Purchasing of Kharāj Land

As has been discussed above, kharāj-land occupies a special position in Islamic law. Its unique position reflects the fact that although the land belongs to the ummah (state), jurists as well as historians still refer to the land-holders as owners.<sup>77</sup> This is because some of them were the previous owners before their lands were declared kharāj, after it had been conquered, and they were permitted to continue holding the lands.<sup>78</sup> Others were new holders (owners), whether they were Muslims or non-Muslims, taking possession with the consent of the Muslim authority.

However, according to the Islamic law of contract, kharāj-holder, in theory, by no means can sell or transfer the title of the land without the agreement of the authority; since he is only a lessee, or merely a de facto owner. It is an established legal principle that one can not engage in any transaction over the property which does not legally belong to him. This complex legal question has led to differences of opinions among the jurists who were trying to resolve and justify its position in accordance with the Islamic legal point of view. It is beyond the scope of this inquiry to discuss that question.

### III. 'Ushr (Tithe )

#### A. Basic Notion of 'Ushr

The tenth or tithe is imposed as a financial obligation on the property which dhimmī or musta'min used for trade. It is a trade-tax which is levied only when the goods are transported from one country to the other within the Islamic state. The rate charged for the dhimmī is a half-tenth.<sup>1</sup> As for the musta'min the tax is levied on the goods imported into the Islamic state for trade purposes. The rate was, as a general rule, a tenth though, for musta'min, it may be increased or decreased depending on the rule of reciprocal treatment.<sup>2</sup> It is also levied on a Muslim, at the quarter of the tenth, on the trade commodities when goods are crossing from one region to the other within the Islamic state. But for the Muslim this tax is considered as zakāt proper.<sup>3</sup> It is charged on all kinds of merchandise whether it is textiles, livestock, including pigs and liquor, or grain.<sup>4</sup> However, the goods must reach a specific amount of value (niṣāb), as in the case of zakāt, in order to be liable to taxation. The taxable amount was fixed at the value of every two hundred dirhams or twenty mithqāl (in gold). Therefore, the chargeable amount will be five dirham for the Muslims, ten for the dhimmī and twenty for ḥarbī respectively.<sup>5</sup> The majority of the jurists held that it is to be charged



once a year regardless of the frequency of the crossing by the same merchant.<sup>6</sup> But Mālikī and Ḥijāzī jurists contend that it is to be charged for every crossing. For, to them, the tax is not to be considered as and should not take the rule of alms-giving.<sup>7</sup> In like manner, the musta'min will definitely be charged for every new entry into the Islamic state provided that the goods are of chargeable value.<sup>8</sup>

#### B. The Legitimacy of 'Ushr.

In fact, this kind of tax had prevailed in Arabia and the surrounding areas before the advance of Islam. It was imposed by several rulers for a variety of reasons.<sup>9</sup> It was not known in Islam, however, until the time of 'Umar I.<sup>10</sup> This is, perhaps, because there was no need for such a tax in the early stage of the Islamic state.<sup>11</sup>

The jurists are of the opinions that there are two legal basis for the imposition of 'ushr; namely the practice (sunnah) of 'Umar I and the consensus of the Companions. It was reported that 'Umar I appointed both Anas b. Mālik and Ziyād b. Ḥudayr to collect 'ushr from the merchants when they crossed the checking point.<sup>12</sup> Anas says: "The Caliph instructed me to collect from the Muslims the quarter of the tenth, from the dhimmī the half of the tenth, and from the ḥarbī the tenth respectively."<sup>13</sup> The fact

that the said appointment occurred coupled with the instruction from 'Umar I, in the presence and acknowledged by the Companions, was sufficient for the act to be considered as a consensus of the Companions. There was no dissenting opinion reported.<sup>14</sup> The act therefore constituted legal basis and set a precedent for a subsequent Muslim authority to follow its rule.<sup>15</sup>

On the other hand, there was no agreement among the jurists as for the justification of the tax as well as the rate collected from dhimmī. Abū 'Ubayd says that it is to be implied from the peace agreement.<sup>16</sup> For the dhimmī was neither Muslim nor ḥarbī where the former is charged for the rate of zakāt whereas the latter is charged for the reciprocal basis which could be less or more depending on their charge on the Muslim traders.<sup>17</sup> Abū 'Ubayd concluded: "I think that 'Umar I took from the dhimmī (merchants) in accordance with the term of agreement. Thus, it became the right of the Muslims over them."<sup>18</sup> On the contrary, when Ibn Shihāb al-Zuhrī (d. 124/741), a tābi'ī jurist, was asked as to why 'Umar I charged the tithe from the dhimmī, replied that the practice had existed since pre-Islamic time, so the Caliph decided to retain it for the interest of the Islamic state. But Abū 'Ubayd preferred the first view which was also the opinion of Mālik.<sup>19</sup> Ḥanafī jurists,

however, explain that the tax is levied in return for the protection of the goods as the needs of the dhimmī merchant for protection is more obvious than the Muslims because the threat to the goods of the dhimmī is more likely to happen than that of the Muslims.<sup>20</sup> It is also argued that in doing the trade the dhimmīs have used all facilities including infrastructures provided by the state. It, therefore, would be reasonable if they could contribute to the state some of their profits from the trade.<sup>21</sup>

These various justifications and views given by the jurists was, in fact, are the result of no specific text dealing with the matter. It was rather the act of 'Umar I based on his ijtihād for the interest that he perceived, in his time, in accordance with the rule of al-siyāṣah al-shar'īyyah (Islamic rules of polity).<sup>22</sup>

Perhaps the acceptable interpretation of the tax is the one given by Zaydān who says that the dhimmī has no financial obligation on his property except on the one used for trade.<sup>23</sup> Apart from that, there is no financial burden on his property whether on the property uses for trade within his own region or on any other income from livestock, grains etc. This is not the case of the Muslim where he has to pay zakāt on almost any kind of his property when the value reaches the taxable amount.<sup>24</sup> The jizyah imposed on



the dhimmī however is by no means parallel to zakāt in terms of its requirements and amounts. The same applies to kharāj where the payment or the burden is on the land rather than on the person, so that, in some cases, the Muslims are included.<sup>25</sup>

In conclusion, it can be said that the jurists agreed that the dhimmī has to pay ‘ushr on his trade property when it crosses one region to the other; but for the immovable property, is not subject to taxation. That was the state of the affairs in the Islamic state. If, for one reason or another, the situation of the dhimmī is changed, where he has to pay tax equally on all kinds of his properties like the Muslims, then both dhimmī and Muslims will be paying the same amount of tax.<sup>26</sup> For the state may decide, its taxation policy, in accordance with its need which varies from time to time. At times, ‘Umar I, as reported by Abū ‘Ubayd, reduced the rate to half if the musta’mīn carries the food-stuffs to Medina in order to encourage the merchants to bring more food to Medina.<sup>27</sup> This is a clear illustration of the changing policy in accordance to the needs and the interest of the state.

#### IV. Observance of Some Aspects of Islamic law

Besides financial obligation, a dhimmī, as well as, musta’mīn are required to observe some aspects of

Islamic law. For by virtue of the contract, the dhimmī has become an integral part of the Islamic state. Hence, he is expected to abide by the Islamic law except in certain cases involving the beliefs and the freedom to practise them.<sup>1</sup> For instance, he is not required to pay alms-giving or participate in jihād or any other similar instances which involve purely religious or ritual in nature. By the same token, the dhimmī is free to perform whatever act allowable according to his religion though the same act is prohibited, by Islam, for the Muslims such as consuming pork, wine, or the like.<sup>2</sup> The same is true with regards to his practices in religion and personal laws concerning marriages, divorce etc. For the position of Islam, in this respect, is clear in a maxim which says: "Leave them with whatever they believe."<sup>3</sup> Hence, in no case, can the Muslim authority intervene in this domain of the so-called "social and religious autonomy of the Protected People."<sup>4</sup> Nevertheless, if a dhimmī takes his case to the Muslim court, in these matters, the Muslim judge has no choice but to hear the case and judge among them according to the provision of the Islamic law.<sup>5</sup> For it is inconceivable for the Muslim court to rule with the law, if any, of the non-Muslims.<sup>6</sup> The Qur'ān has instructed

"So judge between them by that which God hath revealed, and follow not their

desires, but beware of them lest they seduce thee from some part of that which God hath revealed unto thee...."7

However, some jurists held that the Muslim judge, in this case, can either rule or disclaim jurisdiction. This option was based on the following injunctions:

If then they have recourse unto thee (Muhammad), judge between them or disclaim jurisdiction. If thou disclaimest jurisdiction, then they can not harm thee at all. But if thou judgest, judge between them with equity. Lo! God loveth the equitable.

How come they unto thee for judgement when they have the Torah, wherein God hath delivered judgement (for them)? Yet even after that they turn away. Such (folk) are not believers.

Lo! We did reveal the Torah, wherein is guidance and a light, by which the Prophets who surrendered (unto God) judged the Jews and the rabbis and the priests (judged) by such of God's Scripture as they were bidden to observe, and thereunto were they witnesses. So fear not mankind, but fear Me. And barter not my revelations for a little gain. Whoso judgeth not by that which God hath revealed: such are disbelievers.

Let the People of the Gospel judge by that which God hath revealed therein. Whoso judgeth not by that which God hath revealed; such are evil-livers.<sup>8</sup>

From these verses, two principles are explicitly established namely: judicial autonomy is prescribed for non-Muslim subjects according to their respective religions; and Islamic jurisdiction is, however, applicable to non-Muslim whenever one of the parties



takes the case to the Muslim court as above.<sup>9</sup> However, the exegetes and jurists have differed whether the verse "Judge between them or disclaim jurisdiction" had been abrogated by the later-revealed verse, "So judge between them by that which God hath revealed...."<sup>10</sup> At any rate, the question of abrogation is not a matter of opinion or ijtihād by individual person; it rather a matter of tawqīf (handed down from the Prophet), thus, Jaṣṣāṣ and others prefer that it was properly abrogated as reported by Ibn 'Abbās, 'Ikrimah and others.<sup>11</sup>

In cases of conflict of laws which might be arised, whether between any dhimmī code and Islamic law, or between different dhimmī codes, the judicial autonomy should be the basis. Therefore, the Islamic jurisdiction is the state jurisdiction except in matters for which there are applicable rules in non-Muslim religious codes, even if the latter conflicts with Islamic law.<sup>12</sup>

Apart from what has been discussed above, non-Muslims are required to abide by the Islamic law whether in matters of civil, criminal, contract or even in personal law (in cases where there is no provision in non-Muslim codes). For in those areas of laws the non-Muslims will be treated like the Muslims. As the jurists say: "For them is whatever for us and against them is whatever against us."<sup>13</sup>

In Saudi Arabia, the Muslim court has the jurisdiction to try all cases involving all persons living in its territory. Hence, there is no different treatment accorded between Saudis or non-Saudis in terms of its liability towards the same court of law or judicial power. This means that the courts apply the Islamic law over all cases whether it be a family or otherwise. To this end are some provisions contained in the Act of Regulating the Responsibilities of the Muslim Courts (maḥākīm al-sharʿiyya) 1372 A.H.<sup>14</sup> As we have seen Saudi Arabia follows Ḥanbalī school of law.<sup>15</sup>

Moreover, as subjects of the Islamic state, the dhimmī are not expected to stir up the sensitivity of the Muslims. The non-Muslims should also respect the dignity of the Islamic state where they live in. Hence, it is not proper for them to abuse God, Islam, the Prophet and the Qur'ān.<sup>16</sup> This is, in fact, apply to the Muslims as well. It follows that whoever abuses the Prophet, Muslim or non-Muslim, man or woman, he will be killed.<sup>17</sup> This is the consensus of all scholars and jurists of all schools.<sup>18</sup> For to commit such an act is clearly an infringement of the contract and undermine the religion of the state. The same rule applies to musta'mīn.<sup>19</sup>

The dhimmī as well as musta'mīn are also not allowed to openly indulge in buying and consuming

wine, pigs, and other prohibited items in Islam in the Muslim areas and transport these items openly. For these activities are considered as undermining the Muslim feelings and sensitivity. Since in the Muslim city it is the place for the Muslims to exhibit the Islamic activities.<sup>20</sup> However, in non-Muslim areas, the dhimmī can publicly engaged in those activities since they are allowable for them.<sup>21</sup> We also believe that in the Muslim areas, the non-Muslims should not eat or drink publicly during the day of Ramaḍān where the majority are engaged in fasting.<sup>22</sup>

Finally, the dhimmī and musta'min should abstain from committing any act which is prohibited in his religion such as adultery or any abominable act. This prohibition runs concurrently both in Muslim and non-Muslim areas.<sup>23</sup>



### CHAPTER THREE

## The Islamic Attitude towards non-Muslims

### I. Basic Notion of "Tolerance"

Although the term "tolerance" is not found in the classical Arabic texts, the Islamic viewpoint can be understood from the acts or practices which are permitted under some provisions of the Qur'ān and the sunnah and the juristic interpretation thereof. It involves the beliefs, actions, opinions etc. of the minority which might differ from the established or prescribed religion of a country. It also defines their rights to life, responsibilities in the community by the virtue of human dignity as recognized by Islam. Tolerance in this sense therefore is not something that can be formulated by human beings. But it is rather the prescription of Islam vis à vis non-Muslims as had been demonstrated by the Prophet and his Companions. It is a binding force that no authority can defy or ignore, for the concepts and principles of Islamic tolerance are embodied in the texts and sources of Islamic law. It implies that if the adherents of different faiths residing in a Muslim country insist on following their own beliefs, personal statutes and practices derived from it, they may do so provided that their liberty should not be considered as absolute; for liberty if it is not

properly used it would conflict with the rights of others. So non-Muslims' rights will be questioned if they fail to respect or undermine the law of the country, vilify its principles, or if they tend to disturb the peace and general security of the country.<sup>2</sup> The matter becomes more complex if the teaching of two different religions contradicts each other as we shall see.

In short, religious tolerance implies that every person in society has the right to belief what he thought to be right; that he has the freedom to exercise his religion as he wishes and that all adherents of different religions are equal before the law.<sup>3</sup>

## II. Some Principles of Tolerance

The Islamic conception of tolerance towards non-Muslims can be based on these major principles:

A. Human Dignity. Every human being irrespective of his religion, race or colour should be respected and protected. This principle is manifest in the Qur' ān. It says:

Verily We have honoured the children of Ādam. We carry them on the land and the sea, and have made provision of good things for them, and have preferred them above many of those whom We created with a mark of preferment.<sup>4</sup>

The verse clearly recognises the supremacy of

mankind over all other creatures. It is a priori that man has been chosen to rule the world and to build up civilization, at any given time depending on his skill and technology, so that he can acknowledge the power and greatness of God. Therefore, it is appropriate that God has appointed man to be his vicegerent on the earth.<sup>5</sup> Since this subject is too vast to be handled here, it is beyond the scope of this work.

In relation to the verse above, there is a Tradition narrated by Bukhārī from Jābir ibn ‘Abd Allāh that the Prophet stood up when a funeral procession was passing in front of him. A man said to him: "The dead man was a Jew". He said: "Was not he a human being?". The man said: "Yes". Then the Prophet said: "Every human being in Islam has a place and dignity (which should be respected)."<sup>6</sup> This Tradition clearly shows that the Prophet has demonstrated personally, by his action, that every human being regardless of his religious background should be respected not only when living but also when dead. That is why according to the Islamic law of jihād it is prohibited for the Muslim soldiers to disfigure, mutilate, or show of disrespect to the dead body of enemy soldiers. We know that every action of the Prophet is an example and model for the Muslims to follow.<sup>7</sup>

It should be noted that this idea of human dignity



stems from the concept of unity of mankind in Islam. For Islam considers that all human beings came from the same origins, i.e. Ādam and Eve.<sup>8</sup> It is also the subject of all revealed Books.<sup>9</sup> The fact that men are from the same origins implies they should be treated equally. Thus men are in reality, on equal footing in the context of reality of mankind. There is no reason whatsoever to discriminate, enslave, restrict their liberties let alone to treat mankind on the basis of class-system or on any social background. For the noblest and honoured man in the sight of God is the one that is the best in conduct.<sup>10</sup>

It follows that since mankind came from the same stock, it should have one standard or unified values that is acceptable to all. This universal values, so to speak, must be able to suit all peoples at all times in all places irrespective of religion, colour, or any social backgrounds. Needless to say however that some local customs or norms which would be more suitable to local needs has its own role to play and should not be neglected. These common values such as honesty, sincerity, justice and the like are the subject of common good of mankind. Therefore, they have become the common principles of all revealed religions for the interest of all mankind.

B. Differences of Religion Is a Sign of the Will of God. This idea of tolerance towards different religions stems from one of the main principles of the Islamic teachings namely, unity of religion. For, according to Islam all revealed religions beginning from the message of Ādam down to the Prophet Muḥammad were series of revelations that God has sent down, because of His Mercy, from time to time, in order to guide mankind to the path of God. The central theme of these religions, however, or its basic faith remained the same that is to believe in the existence and the unity of God (al-tawḥīd), and to acknowledge His entire creation including mankind. The purpose of this creation was to serve and worship Him.<sup>11</sup> Despite the fact that the fundamental teachings of these religions are the same, the branches of law which regulate the mode of people's life may differ from time to time depending on the situation and the need of the people at the time.<sup>12</sup> It seems therefore the terms religion (al-dīn) and sharī'ah, in this context, have two different meanings. For one thing religion is devoted to the main principles of basic faith which is fixed, perpetual, and is not subject to alteration or abrogation. This basic faith remains the same though religions are changeable with the changing of the prophets. This is the messages of all prophets of God.<sup>13</sup>

On the other hand, shari'ah is a body of rules mainly dealing with the practical aspects of human life at the time which may be subject to alteration or abrogation. It also deals with branches of law or modes of worship which may differ from time to time among the revealed laws. This is because each law has to suit each generation and its local needs. The common values, however, remains the same.<sup>14</sup> According to the Qur'ān all prophets of God conveyed the same message to their peoples. As God says:

And who forsaketh the religion of Abraham save him who befooleth himself? Verily We chose him in the world, and lo! in the Hereafter he is among the righteous.

When his Lord said unto him: Surrender! he said: I have surrendered to the Lords of the worlds.

The same did Abraham enjoin upon his sons, and also Jacob, (saying): O my sons! Lo! Allāh hath chosen for you the (true) religion; therefore die not save as men who have surrendered (unto Him).

Or were ye present when death came to Jacob, when he said unto his sons: What will ye worship after me? They said: We shall worship thy God, the God of thy fathers, Abraham and Ishmael and Isaac, One God, and unto Him we have surrendered.<sup>15</sup>

The verses above have sum up the faith that based on the unity of God in terms of worship and the surrender and sincere devotion to God. The fact that the term Islām (surrender in this sense) is repeated in the verses above is to emphasize the real religion of God in order to exclude religions adhered to by the



Arabs and the surrounding peoples.<sup>16</sup> This is a fundamental belief in Islam, i.e. belief in all Books revealed by God, and belief in all Prophets of God.

The Qur'ān commands:

Say (O Muslims): We believe in Allāh and that which is revealed unto us and that which was revealed unto Abraham and Ishmael, and Isaac, and Jacob, and the tribes, and that which Moses and Jesus received, and that which the Prophets received from their Lord. We make no distinction between any of them, and unto Him we have surrendered.<sup>17</sup>

But this series of revelations should stop at somewhere when mankind has matured enough with reasonable civilization so that the final message, which is comprehensive and includes all the previous teachings, will suit all humanity and generations to come. Such a complete teaching will not be subjected to anymore abrogation or alteration except its details or branches of law that require some adaptability according the exigencies of the time. This is the meaning of the Qur'ān which says:

"This day have I perfected your religion for you and completed My favour unto you, and have chosen for you as religion al-Islām."<sup>18</sup>

The Prophet Muḥammad himself has demonstrated a practical example of this unity of religion. Bukhārī narrated from Ibn 'Abbās that when the Prophet arrived in Medina, the Jews were performing a fasting in the day of 'Āshūrā'.<sup>19</sup> The Prophet asked: "Why are they

fasting?" They said: "This is the victorious day of Moses over Pharaoh." The Prophet said to his Companions: "You are more deserving of Moses than them so you should fast."<sup>20</sup> This means that Islam is the religion of all prophets and Messengers of God. Since Moses was one of the leading prophets, so the people who adhere to the religion of Islam would be more worthy to respect the anniversary of the Day of his victory and preserve his legacy. It is also because he was one of the advocate of Islam, as those prophets and Messengers that had been sent by God.

As to the position of the Prophet Muḥammad among the Messengers of God, Bukhārī narrated from Abū Hurayrah that the Prophet once said: "To compare myself with the prophets before me is like a man who builds a house with all its perfection except one missing brick at one corner. While onlookers are walking around and praising its beauty, they keep asking: 'What happen to that missing brick?' I am that brick, and I am the seal of the prophets."<sup>21</sup> This Tradition obviously speaks about the unity of religion hence, there is a sort of brotherhood among the prophets because of the unity thereof and the position of the Prophet Muḥammad as a concluding chain of the prophets of God.

C. The Muslim is not held responsible for the disbelief of non-believers, nor could he punish those who go astray for their errors in this world. For those will be held accountable on the Day of Judgement by God alone. Therefore, it is not the business of this world and man has nothing to do with it. Bearing these principles in mind, the Muslim's attitude should be one of peace. There would be no more conflict in his mind between his belief of the infidelity of disbelievers and his duty to act justly to them in all dealings. As God says:

"Allāh will judge between you on the Day of Resurrection concerning that wherein ye used to differ."<sup>22</sup>

D. The Muslim believes that God loves justice and fairness and would prefer to see noble mindedness even to non-Muslims. On the contrary, God hates oppression, and would punish the despot though those acts were committed by Muslims to non-Muslims. God says in this respect:

"...and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your piety."<sup>23</sup>

The Prophet also is reported to have said:

"The prayer of the oppressed, though from non-Muslim, will be no barrier (for God to accept it)."<sup>24</sup>

Those are at least four principles upon which the Muslims should rely in the application of the concept



of tolerance towards non-Muslims. These principles actually contribute to some extent to the co-existence and co-operation between the Muslims and the peoples of other faiths. The degrees of co-operation, however, vary from time to time and from place to place depending on the situation at the time. The ruler, generally speaking, plays a major role in the application of the principle of tolerance, which is envisaged in the Qur'ān and the Traditions of the Prophet. It is therefore a divine Will and should be observed by the Muslim authority as well as the Muslim community. Thus, the Muslim authority can not force non-Muslims to become Muslims, for that act alone would contradict the very principle of tolerance that has been laid down by God.

On the other hand, non-Muslims should not take this tolerance as a weakness of the Muslims. If the concept is not properly observed, it will be a disaster to all; as has frequently occurred in the past. This is a situation which no one would like to see it. Mutual understanding can bring about peace and prosperity to all.

### III. Aspects of Tolerance

Perhaps the most significant area of tolerance offered by Islam to the adherents of different faiths

is the prohibition of compulsion in matters relating to religion. The Qur'ān unequivocally says:

"There is no compulsion in religion. The right direction is henceforth distinct from error."<sup>25</sup>

Thus the Qur'ān recognizes the existence and the adherents of different faiths. They should be allowed to adhere to their beliefs. It is a matter of one's own choice. Hence compulsion is against the spirit of Islamic teachings. It follows that the practice of one's own religion, whether in the forms of cults, creed, modes of worship, rituals, personal statutes etc. should also be tolerated even though those practices contradict the teaching of Islam. This attitude should always be consistent by maintained towards all revealed religions or man-made religions though Islam has special relations with the two revealed religions, i.e. Judaism and Christianity to the extent that the adherents of these two religions are called "the People of the Book."

According to Yūsuf al-Qaraḍāwī there are three stages of tolerance:<sup>26</sup>

A. The non-Muslims would be allowed freedom of religion and its faith. He would not be forced physically to change his religion. But he would not be allowed to practise the teaching of his religion. This is the lowest stage of tolerance;<sup>27</sup>

B. The non-Muslim would be allowed to freedom of

religion and he would not be forced to act anything against the teaching of his religion, or to refrain from anything that he believes he should do. For instances, if the Jews believe that it is forbidden for them, according to the teaching of their religion, to work on Saturdays, the Muslims therefore should not force them to work on that day. The same case would be applied to the Christians who believe that they must go to the church for congregational prayers every Sunday. Any attempt to stop these practices would undermine the spirit of religious tolerance in Islam. This is the middle stage of tolerance;<sup>28</sup> and

C. The highest stage of tolerance is to allow them to practise what they believe to be right and lawful according to their religion even though that particular practice contradicts the teachings of Islam.<sup>29</sup> This stage of tolerance was offered by the Muslims to the dhimmī. It follows that the Muslims in so doing, show tolerance to whatever non-Muslims believe to be lawful according to their religion. The Muslims have never said that it was forbidden and unlawful for the dhimmī, albeit the Muslims could forbid and make it illegal in accordance with the law of the land (Islamic law) and its religion.<sup>30</sup> This is because the permissible thing in any religion does not necessarily mean that it is an obligation that requires everyone to conform with it. If, for



instance, the religion of Magian permits a man to marry his mother or his sister, he could marry someone else. Likewise, if the Christianity allows its followers to consume pork, he can take something else. The same applies to the consumption of alcohol.<sup>31</sup>

If Islam requires the dhimmī not to marry close relatives, or to drink alcohol and consume pork in order to respect the teachings of Islam and preserve the feelings of the Muslims, it would not cause them any religious hardship. For in abstaining from doing those things, they would not be considered as committing an unlawful act and neglecting of performing sacred duty. However, the teachings of Islam do not wish to forbid practices that are believed to be lawful by non-Muslims. Rather, they say to Muslims: "Leave them and what they believe."<sup>32</sup>

Another feature of Islamic tolerance towards non-Muslims is that Islam allows Muslim to marry a non-Muslim women from among People of the Book (kitābiyyāt). For Islam is not exclusive. As a rule, a Muslim must not get married except to Muslim women and vice versa.<sup>33</sup> But special consideration is given to dhimmī women that a Muslim can marry them. Conversely, under no circumstances can the Muslim women marry a non-Muslim men. The Qur'ān says:

And so are the virtuous women of the believers and the virtuous women of those who received the Scripture before you (lawful for you) when ye give them their

marriage portions and live with them in honour, not in fornication, nor taking them as a secret concubines.<sup>34</sup>

According to the majority view of the Muslim jurists this verse clearly expressed the permission for the Muslims to marry a free kitābī women. It may indeed be recalled that one of the Prophet wives was a Jewish woman.<sup>35</sup> The jurists also argued that 'Uthmān ibn 'Affān got married to Nā. 'lāh al-Kalbiyyah, the Christian, and also Ṭalḥah bin 'Ubaydullāh married to a Jewess from Syria. The majority contended that there was no objection from the Companions of the Prophet about those marriages hence, the Companions were in agreement about the marriage to kitābiyyāt. But there was a report that ibn 'Umar said it was reprehensible (karāhah). The same was the opinion of Mālik, and some jurists said it was forbidden.<sup>36</sup> They argued with the verse which says:

"Wed not idolatresses till they believe...."<sup>37</sup>

But the majority rejected the view that the above verse was a general prohibition of marrying non-Muslim women, which was properly specified by the verse in Sūrah al-Mā'idah (5:6). It is also contended that this verse was revealed later than the above verse (2:221). So these two apparent contradictory verses, which speak on the same issue, should be construed under the rule of "specification of the generality" (takhṣīṣ al-

‘āmm).<sup>38</sup> It is worthy noting that from among the Companions who agreed to mixed-marriages were ‘Umar I, ‘Uthmān, Ṭalḥah, Ḥudhayfah, Salmān and Jābir. Nevertheless, according to Ibn Qudāmah ‘Umar I at one time, ordered those who married kitābiyyāt to divorce them.<sup>39</sup> Finally, the permission to marry kitābiyyāt is include all kitābiy whether they are dhimmī mu‘āhid or harbī women except the opinion of Ibn ‘Abbās who says that the Muslim is not allowed to marry harbī woman.<sup>40</sup>

As for the marriage to Magian women the majority says that it is prohibited to have such a marriage since the Magians were not considered as "the People of the Book". However, Zāhirī's jurist says that it is allowable because they were "the People of the Book" proper.<sup>41</sup> The same was the opinion of Abū Thawr (d.240/854) who based his opinion on the Tradition of the Prophet which says: "Treat them (Magians) as you have treated People of the Book." Abū Thawr also argued that the fact that the Prophet took jizyah from them is sufficient to include them as "the People of the Book."<sup>42</sup> However, the Qur'ān says:

"Lest ye should say: The Scripture was revealed only to two sects before us  
...."<sup>43</sup>

Had the Magians been "People of the Book" it would have mentioned three groups of "People of the Book" which would be contrary to the general understanding



and the prevailing view of the concept itself. As far as the Tradition is concerned it is because the Magians were not "the People of the Book" that had led the Prophet issued specific instruction, to his Companions, as to the rule regarding the Magians. The instruction was to include them under tributary people, i.e. paying jizyah. To support this argument the majority invoke the full text of Tradition which says:

"Treat the Magians as you have treated the People of the Book but not marrying their women and consuming their slaughtering."<sup>44</sup>

On the question of marrying Ṣā'ibah (Sabean) women there was also no unanimous agreement among the jurists. while Abū Ḥanīfah says that it is allowable, Abū Yūsuf and Muḥammad al-Shaybānī held that it is forbidden. The central issue rests on whether al-Sā'ibah was considered as the "People of the Book" or otherwise. For those who say they were "People of the Book" then marriage to their women is permissible and vice versa.<sup>45</sup>

For the rest of non-Muslim women such as the polytheists, the idolaters, the worshippers of any image and those who confess no religion, the Muslim jurists unanimously agreed that marrying them is forbidden.<sup>46</sup> According to some jurists the fact that they remain in their religions is self-evident that the bond of marriage, if it is occurred, could not

survive because of the prevailing misunderstanding and antagonistic in the husband-wife relationship rather than peaceful and harmonious environment. The case would be different, perhaps, if marriage relationship occurs between Muslim and kitābī women. For one thing the woman already confesses and believes in some tenets in common, that is to say belief in Book and prophets of God. In that sense, it is hoped that she would be eventually be attracted to the teachings of Islam which is not so much at variance with her existing belief.<sup>47</sup> It is worthy noting that according to Islamic law, any man or woman, of any race or faith, may, on accepting Islam, freely marry any Muslim woman or man, provided it be from motives of purity and chastity and not of lewdness.

One immediate impediment that intermarriage encounters is the fact that the wife would be denied her share in the inheritance in the case of her husband predeceasing her. This involves the doctrinal application of the Islamic law of inheritance which says: "The infidel cannot inherit from the Muslim."<sup>48</sup> The principle is a corollary from the concept of ikhtilāf al-dīn, different of religion, as one of obstacle for inheritance in Islam.

In the matter of food, the Muslim is not allowed to consume any slaughtered animal except one that is properly slaughtered by the Muslim. As an exception to

this rule, the Muslim is granted permission by God to consume an animal<sup>49</sup> slaughtered by the "People of the Book." The Qur'ān says:

"This day are (all) good things made lawful for you. The food of those who have received the scripture is lawful for you, and your food is lawful for them."<sup>50</sup>

The Qur'ān introduces the term al-tayyibāt, that is, good, pure and beneficial.<sup>51</sup> The rules of Islam in this respect being analogous to those of the "People of the Book." This is in order to oppose the meat killed by pagans with superstitious rites. In this regard the Christian rule is as follows:

"That ye abstain from meats offered to idols, and from blood, and from thing strangled, and from fornication".<sup>52</sup>

Unlike inter-marriage this matter posed no legal issue among the jurists. All schools of law,<sup>53</sup> except Shī'ī school, unanimously agreed that the food of the the "People of the Book" is lawful for the Muslims except pork and its derivatives in food and liquor.<sup>54</sup> It should be noted that there is no differences in terms of permission whether the food is from dhimmī, harbī, and mu'āḥad provided that they are kitābī and whether they are kitābī Arab or non-Arab.<sup>55</sup>

#### IV. Some Archetypes of Muslim Tolerance

Bat Ye'or in her discussion of Muslim tolerance states that:



It is this context of a perpetual and universal religious war that gives to Islamic toleration its peculiar characteristics. Indeed, the Prophet's protection granted to the the "People of the Book," his prohibition of compulsion in matters of religious belief, encouraged throughout the centuries a current of religious toleration that proved to be an important check to fanaticism in times of darkness and prejudices. It is sufficient to mention here this positive, permanent aspect that projects a brighter light upon the dhimmī condition.<sup>56</sup>

She continues to write:

"According to a hadīth, the Prophet is reported to have said: 'Whoever kills a tributary will not inhale the scent of Paradise.'"<sup>57</sup>

T.W. Arnold while discussing the position of Christians under Arab rule says that:

Living under this security of life and property and such toleration of religious thought, the Christian community - especially in the towns - enjoyed a flourishing prosperity in the early days of the Caliphate. Christians frequently held high posts at court, e.g. a Christian Arab, al-Akhtal, was court poet, and the father of St. John of Damascus, counsellor to the Caliph 'Abd al-Malik (685 - 705). In the service of the Caliph al-Mu'tasim (833 - 842), there were two brothers, Christians, who stood very high in the confidence of the Commander of the Faithful: the one, named Salmoyah, seems to have occupied somewhat the position of a modern secretary of state, and no royal documents were valid until countersigned by him, while his brother, Ibrāhīm, was entrusted with the care of the privy seal, and was set over the Bayt al-Māl or Public treasury, an office that, from the nature of funds and their disposal, might have been expected to have been put into the hands of a Muslim; so great was the Caliph's personal affectation for this Ibrāhīm, that he visited him in his sickness .... Naṣr ibn Hārūn, the Prime Minister of 'Aḡūd al-

Dawlah (949 - 982), of the Buwayhid dynasty of Persia, was a Christian, and built many churches and monasteries. For a long time, the government offices, especially in the department of finance, were filled with Christians and Persians.<sup>58</sup>

When Jerusalem submitted to the Caliph 'Umar I and conditions were drawing, 'Umar, in company with the Patriarch, visited the holy places, and it is said while they were in the church of the Resurrection, it was the time for appointed hour of prayer, the Patriarch bade the Caliph to perform his prayer there, but he thoughtfully refused, saying that if he were to do so, the Muslims might henceforth claim it as a place of their worship.<sup>59</sup>

The Caliph Mu'āwiyah (661-680), rebuilt the great church of Edessa at the intercession of his Christian subjects.<sup>60</sup> In the case of the great Cathedral of St. John in Damascus, it was divided between the Christians and the Muslims and for eighty years the adherents of the two religions worshipped under the same roof. Some Caliphs wanted to convert the whole into a mosque, but abstained on finding the fact that the terms of agreement forbade it. It was not until about A.H. 90 when the Caliph Wālid effected by force what others had sought to gain by fair deal and at times, by a large sums of money. When 'Umar II took his office, he listened to the complaints of the Christians against the injustice that had been done



and gave them, in exchange, those churches of the city and its suburbs that had been confiscated at the time of his predecessors.<sup>61</sup>

From the examples given above of the toleration extended towards the Christians Arab by the victorious Muslim of the first century of the Hijrah and continued by succeeding generations, with the exception of particular period such as perhaps in the reign of the Caliph al-Mutawakkil (232-247/847-861), we may surely infer that those Christians tribes that did embrace Islam, did so of their own choice and freewill.<sup>62</sup> "The Christian Arabs of the present day, dwelling in the midst of Muslim population, are a living testimony of this toleration."<sup>63</sup>

Furthermore, it was under the principles of justice, toleration and moderation that the Caliph Abū Bakr advised his army of the first expedition to Syria as follows:

Be just; break not your plighted faith; mutilate none; slay neither children, old men nor women; injure not the date palm nor burn it with fire, nor cut down any fruit bearing tree; slay neither flocks nor herds nor camels, except for food; perchance you may come across men who have retired into monasteries, leave them and their works in place; you may eat of the food that the people of the land will bring you in their vessels, making mention thereon of the name of God; and you will come across people with shaven crowns, touch them only with the flat of the sword. Go forward now in the name of God and may He protect you in battle and pestilence."<sup>64</sup>



In fact the co-existence today of Judaism, Christianity and Islam, in the Muslim lands, is due in no small measure to the concept of tolerance in Islam. As the last and most comprehensive of the three it did not seek, in an age of intolerance, to eliminate its predecessors. Not only had it no positive policy of suppression, when it was at the peak of its political power, it had in fact a positive one of co-existence.<sup>65</sup> According to Ṭibāwī: "The notion of religious equality is of fairly recent origin, and even in our own times it is still an ideal which is seldom attained. But barring concession of equality to other religions Islam was tolerant of them, both in theory and in practice. It is true that practice had occasionally fallen below the standards of theory, but its validity was irrevocable because it is enshrined in the divine revelation itself. It is clear then that the doctrine of religious tolerance in Islam has an idealistic origin. When it was first proclaimed and practised in the seventh century A.D. it must have appeared in sharp contrast to the contemporary fanaticism, interdenominational strife and persecution amongst the Christians themselves in the Byzantine Empire. As a measure of practical politics the Islamic doctrine of religious tolerance was amply vindicated by the ready welcome of the Muslim armies by the Christians and Jews in Syria and elsewhere in the Near

East." 66

Tibāwī argues that, "Hence it is fallacious to allege, as it has recently become fashionable to allege, that 'the People of the Book' were treated by the Islamic state as 'second-class citizens.' The allegation is fallacious not only because it projects into the distant and different past the comparatively modern notion of equality of citizens irrespective of their religious beliefs, but also because it ignores the view which non-Muslims, at the time, held of their status under Muslim rule. Could they have had a better status elsewhere?" 67

It was reported that 'Umar I, in demonstrating the spirit of toleration, once met a blind old man begging and asked him how he came to that state. Knowing that he was a dhimmī Jew, 'Umar took him by his hand to his house and gave him something and then ordered the Treasury officials to look after the welfare of the man and the likes. He said: "We have not been fair to him by taking (something) from his youth and neglected him when he is old and then he cited 'The alms are only for the poor and the needy.' 68 'Umar explained that this is the 'needy' of 'the People of the Book.'" He then ordered jizyah to be remitted from him and his likes. 69 Moreover, despite the fact that he was stabbed by a dhimmī, it did not hamper him to advice his successor to look after the welfare of ahl al-

dhimmah: On his deathbed, 'Umar delivered this statement: "I recommend the Caliph after me to look after the welfare of ahl al-dhimmah, to fulfil the pact to them, to protect them and not to over-burden them." 70

It was reported that when the Prophet passed away, his armour was still with a Jew which he had deposited it as a security (marhūn) in order to get something for his family maintenance. 71 The Prophet did so, we believe, in order to teach his ummah how to interact with non-Muslims in matters relating to daily life. Such a practice was also a clear evidence as to the permissibility of interaction with non-Muslims in mundane matters. The Qur'ān laid down a rule as follows:

Allāh forbiddeth you not those who warred not against you on account of religion and drove you not out from your homes, that ye should show them kindness and deal justly with them. Lo! Allāh loveth the just dealers. 72

Fair treatment and some rules of toleration towards non-Muslims has been very well defined by a Mālikī jurist, Shihāb al-Dīn al-Qarāfī in the following words:

Fair treatment consists of showing kindness to their weak and helping their poor and destitute, and feeding their hungry, clothing their naked, and uttering kind words to them - from the position of grace and mercy and not from the position of fear and disgrace - and removing their hardship as their neighbours if you have power to remove it, praying for their guidance so



that they can become the happy and fortunate people, giving them good advice in all their affairs - the affairs of this world and the next world- and looking after their interest in their absence. If any one hurts them and deprives them of their property of family, possessions and their rights, you should help them by removing their persecution and make sure to restore all their rights to them.... 73

These are general outlines which the jurist such as Qarāfī was trying to elaborate of the term birr as indicated in the verse above. Nevertheless, generally speaking, law is always in the hands of the authority. It is natural phenomenon that we see in any society, no matter how ideal the law is, the application of such a law always rests with the degrees of the ruler's piousness and statesmanship. The oppressive measures of some unjust Muslim rulers should not undermine the original objective of the law which reflected a genuine spirit of toleration and provided safeguards for the non-Muslim subjects who preferred to adhere to their own religions. In this regards Majid Khadduri has made his conclusion:

If a spirit of intolerance had at times been shown, it was the symptom of a growing oppressive rule which caused the Muslim populace at large to suffer no less than the non-Muslims. Mob violence may have been at times focussed against non-Muslims, but mob violence indicates a dissatisfaction and unjust rule under which neither Muslims nor dhimmīs could live with prosperity and security.

If certain Caliphs and governors were harsh and brutal, others were inclined to show magnanimity and generous spirit. Under reckless rule the dhimmīs may have suffered persecution, but the Muslim were not much

better off.... The general treatment of the dhimmis under Muslim rule, however, must be measured not in terms of such a suffering at the hands of careless Caliphs and individual Muslims but in the spirit of tolerance embodied in the law and in the general spirit prevailing in each age and generation, and this must also be judged in terms of the relative prosperity and security enjoyed by the majority.<sup>74</sup>

Thus far we have dealt with theory of tolerance in Islamic law in an attempt to understand its main characteristics and underlying principles. To this end Islam demands the realization of its basic truth, to show respect to all prophets of all monotheistic religions, and prohibits fighting for no cause other than God, persecution and oppression. In the meantime, it urges mankind to establish justice, law, and order. To achieve this summum bonum Islam invites all mankind to come to the same terms. The Qur'ān says:

Say: O people of the scripture! Come to an agreement between us and you: that we shall worship none but Allāh, and that we shall ascribe no partner unto Him, and that none of us shall take others for Lords beside Allāh, and if they turn away, then say: Bear witness that we are they who have surrendered (unto Him).<sup>75</sup>

## CHAPTER FOUR

### THE DHIMMĪ'S JUDICIAL STATUS

In this chapter the dhimmī's position as well as his rights and obligations in all major branches of Islamic law viz. criminal, family, and contract will be surveyed in detail. In criminal law, although its provision is clearly articulated, as to the modes of offence and its punishments, in the major texts of the Islamic law, the jurists nevertheless, in their interpretations of the law, in some cases are in disagreement in the course of its application vis à vis the dhimmī as will be seen. In other areas of laws, however, the disagreement is almost nil.

#### I. Criminal Law

In Islamic law, as in other positive laws, there is a body of rules pertaining to crimes and its punishments.<sup>1</sup> This body of rules is equivalent to modern notion of criminal law. In Islamic law, the law of punishments is based on the divine revelation embodied in the Qur'ān and the Tradition of the Prophet Muḥammad. As in other field of Islamic law, different interpretations of legal scholars and jurists of the Qur'ān and the Tradition, as well as varied social, economic, and political circumstances have led to the establishment of various legal



theories on almost all the key issue not excluding the Islamic Criminal Law.

A. Is Islamic Law a Universal or a Territorial Law?

In theory, Islamic law is universal in character and its scope. It appeals to all mankind, Muslims and non-Muslims, and governs the inhabitants of the Islamic state and non-Islamic state.<sup>2</sup> This is the position of the Qur'ān as it declares: "We sent thee not, but as a mercy for all universe (mankind)."<sup>3</sup> But Islam has not been accepted by all peoples and the imposition of it would contrary to its very teaching; hence its law, though it is universal, could only be implemented within the domain of Islamic territories. For, to enforce the law it needs sovereignty. The circumstances therefore necessitated Islamic law being territorial rather than universal.<sup>4</sup> Consequently, it entails two vital legal questions as to the extent of its territorial jurisdiction, namely could the Islamic law be applied to all its citizens or could it be applied only to some of its citizens? If Islamic law is applied to all criminal cases within its territory, could it be applied also on crimes committed by its own citizens outside its territory (dār al-ḥarb)?

Theoretical speaking, Islamic law should be applied to all inhabitants irrespective of their own social backgrounds.<sup>5</sup> Thus, it is necessary for all

citizens to conform with Islamic law, except in some cases as will be seen, not only in its own territory but outside its territory as well. According to Islamic legal principles therefore it should be applied to all criminal cases committed within its own territory regardless of the culprit, and over the crimes committed by its own citizens outside its territory. The legality of this principle reverts to its nature. But for practical reason its applicability has to be confined to dār al-Islām and to those who reside therein, though the criminal is alien to it and the crime committed outside its realm (in the case of its own citizens). This is because the Islamic law could not be enforced in dār al-ḥarb for lack of jurisdiction.<sup>6</sup> These are the general principles of Islamic law pertaining to our subject of inquiry at this point.

However, according to 'Awdah, the jurists differ as to the applicability of it into three theories in respect of territorial jurisdiction of Islamic Criminal Law.<sup>7</sup>

### 1. The First Theory

It is the opinion of Abū Ḥanīfah who says that the Islamic law is applied only to any crimes which occur in dār al-Islām regardless of whether the criminal is Muslim or dhimmī, for there is no law for the Muslim

except Sharī'ah; likewise the dhimmī who supposedly accepted the Islamic law by virtue of concluding permanent contract with the Islamic state ('aqd al-dhimmah).<sup>8</sup>

As for those who resides temporarily (musta'min) in dār al-Islām, the Islamic law is not applicable to them if the crime committed is something to do with the rights of God;<sup>9</sup> but if the crime is touching on the rights of human being, he should be punished.<sup>10</sup> Abū Ḥanīfah maintains that musta'min lives in dār al-Islām temporarily for specific reason, i.e. trade, tourism, transit etc. But for the crimes of qīṣāṣ (retaliation) and qadhf (false accusation of unchastity), he should be held responsible because of the severity of the crimes. He is also responsible for stealing or illegal seizure and destroying one's property, for these crimes are concerned with the individual's right.<sup>11</sup>

If the crime is committed by a Muslim or dhimmī outside Islamic territory the Islamic law is not applicable, even if the criminal is now living in dār al-Islām.<sup>12</sup> For Abū Ḥanīfah the question is not whether the Muslim or dhimmī should abide the Islamic law wherever he is, but the question is whether the Muslim authority has the power to exercise its jurisdiction. Since it has no jurisdiction in dār al-ḥarb, then it would not be responsible for



punishment.<sup>13</sup> The case would be different if the crime committed by a Muslim or a dhimmī or even a musta'min, who then fled to dār al-ḥarb. The criminal still be held responsible because the crime had been committed within the Islamic territory.<sup>14</sup> In like manner, if the crime occurred in the camp of the Muslim army in dār al-ḥarb, it takes the same rule as applies to Islamic territory. But if it occurred outside the camp, it takes the rule of being a crime in dār al-ḥarb.<sup>15</sup>

Abū Ḥanīfah says that the crimes committed by Muslim soldiers while they were on their expedition should not be punished until they have returned to dār al-Islām. This opinion is based on the Tradition which says: "Do not cut off the hands of the soldiers (during their expeditions)."<sup>16</sup>

Furthermore, Abū Ḥanīfah maintains that when the Muslim and dhimmī enter dār al-ḥarb as musta'min, legally and peacefully, they can perform a contract based on ribā (usury) or other voidable (fāsid) contracts with the ḥarbī or the Muslim resident of dār al-ḥarb.<sup>17</sup> For such a contract is conducted based on consent and eventually would weakening the position of ḥarbī. As for the Muslim residents of dār al-ḥarb, his property in such a territory is in the state of uncertainty. This opinion, however, is rejected by Abū Yūsuf who maintains that the Muslim and dhimmī should abide by Islamic law no matter where they are. On the

other hand, Muḥammad al-Shaybānī agrees with Abū Ḥanīfah in the case of ribā contract with a harbī but dissents if the same contract is made with a Muslim.<sup>18</sup> It should be noted that the Muslim by no means can conclude a ribā contract with the dhimmī even though they were abroad as it is invalid at home.

Another case from Abū Ḥanīfah's point of view is that if the Muslim or dhimmī enters dār al-ḥarb as musta'min, then he got a loan from harbī or vice versa; the transaction can not be heard by the Muslim judge, though both parties are now in dār al-Islām because the deal had taken place outside the realm of Muslim jurisdiction.<sup>19</sup> It was also presume that the assets of the inhabitants of dār al-Islām is permissible to harbī and vice versa.<sup>20</sup>

We can conclude that the crimes committed by the Muslim or dhimmī on a harbī in dār al-ḥarb, according to Abū Ḥanīfah, cannot be punished for lack of jurisdiction. This is also true even if the victim, Muslim or dhimmī, is from dār al-Islām: but the victim or his family in dār al-Islām can ask for remedy in the form of money or the like. This means that the Muslim court cannot impose physical punishment on the culprit but can ask for compensation, for the blood of the Muslim is inviolability and should not be shed in vain.<sup>21</sup>

## 2. The Second Theory

This theory was formulated by Abū Yūsuf, he maintains that the Islamic law should be applied to all people in dār al-Islām whether their residence is permanent such as the Muslims or dhimmī or temporary in the case of musta'min. This opinion is based, besides the Muslims and dhimmī, on the ground that musta'min should also abide the rules of Islam by the very fact of temporary peace agreement (amān) which enables him to stay in dār al-Islām temporarily.<sup>22</sup> The fact that he applied to stay in dār al-Islām, even for a short period, clearly implies that he accepted the law of Islam. Hence, his status is just like a dhimmī in this respect. Therefore, a musta'min is liable to the same punishment as other residents, in the event of committing a crime, in dār al-Islām regardless of whether the crime is concerned with the rights of God or the rights of his fellow human being.<sup>23</sup>

So the dispute between Abū Yūsuf and Abū Ḥanīfah is on the criminal responsibility of musta'min in dār al-Islām. On the other hand, he agrees with Abū Ḥanīfah that the Islamic law is inapplicable to any crime committed by the citizen of dār al-Islām abroad with two exceptions:<sup>24</sup>

a. It is not permissible for the Muslim or dhimmī to conclude a contract based on ribā whether with the ḥarbī or Muslim abroad even though such a contract is



deemed lawful by foreign law. This is because Islamic law is binding on the Muslim and dhimmī wherever they are. Nevertheless, if they defy the law, there will be no punishment for them because the court has no jurisdiction at the time of the offence.<sup>25</sup> Hence, the legal issue between Abū Yūsuf and Abū Ḥanīfah over this case is that the latter does not see the act per se as forbidden whereas the former looks upon the act as unlawful;<sup>26</sup>

b. In the event of a Muslim prisoner of war being killed by a Muslim or dhimmī in dār al-ḥarb, Abū Ḥanīfah says no qisās (retaliation) or diyah (blood-money) liable on the killer because being a prisoner, the victim has lost his ‘ismah (inviolability); whereas Abū Yūsuf maintains that diyah is still liable on the killer because despite being a prisoner, the victim still retains his ‘ismah.<sup>27</sup> Abū Yūsuf argues that the Muslim court, though having no jurisdiction for qisās can still hear the case for compensation for the crime committed abroad if both parties are the citizens of dār al-Islām. This is because the court does have jurisdiction over the two parties at the time of the request. Thus, the legal issue over this case between the two great jurists is the same as above.<sup>28</sup>

### 3. The Third Theory

It is the positions of Mālik, Shāfi'ī, and Aḥmad b. Ḥanbal who express the opinion that the Islamic law is applicable over every crime committed in dār al-Islām by any person; Muslim, dhimmī, or musta'min. To them the musta'min is treated like the dhimmī in terms of criminal responsibility. The rule applied to the dhimmī will be applied to him. If the musta'min flees after he has committed a crime, he remains liable to be punished whenever possible.<sup>29</sup> Up to this point this theory seems to be in harmony with that of Abū Yūsuf. But the majority argues further that the Islamic law is also applicable over a crime committed by the Muslim or dhimmī abroad; but not on ḥarbī who has become a musta'min.<sup>30</sup> It is precisely because prior to become a musta'min, he did not abide by the Islamic law during his stay abroad.<sup>31</sup> In the case of a Muslim or dhimmī the concept of different domicile (dār) has no effect over their liability for a criminal act. Therefore, the punishment will be the same no matter where the crime has been committed. So the criterion is whether the act is lawful or forbidden according to the Islamic law not according to the law where he resides (during the commission of the crime). For example, the Muslim or dhimmī is liable to punishment if he concludes a ribā contract abroad even though such a contract is lawful in that country.<sup>32</sup> The same

rule would be applied if he committed any other criminal act.<sup>33</sup>

If the dhimmī had left dār al-Islām for good and all and then committed a crime in dār al-ḥarb, he is not liable to punishment if he returns to dār al-Islām because he would be considered as ḥarbī and no longer dhimmī, by the act of leaving dār al-Islām. The same rule applies to a Muslim who had turned apostate and left dār al-Islām even if he returns as a Muslim.<sup>34</sup> The majority also considered the Muslim military camp as Islamic territory even though it is in dār al-ḥarb.<sup>35</sup>

Mālik and Shāfi'ī say that there should be no delay in punishing the soldier who committed a crime except for sound reason. But Aḥmad b. Ḥanbal says the punishment should be delayed until they all return to dār al-Islām.<sup>36</sup>

#### B. Islamic Criminal Law is a Branch of Public Law

The view expressed by the majority seems to be more relevant to the letter and spirit of the Islamic law which is originally based its applicability on all peoples irrespective of their denominational so long as they are under its jurisdiction and readily accepted the authority of the Islamic state. In addition, the texts have made no distinction between the crime which occurred in dār al-Islām or dār al-



harb. Thus, all citizens of dār al-Islām should work together to prevent the crimes, not to the contrary, because the crime is evil and immorality.<sup>37</sup>

Furthermore, the test of state's sovereignty over its territory is whether its law is fully applied to all its inhabitants. It is also not in variance with the contemporary trend of legists who consider that Criminal law is a branch of public law. The Islamic Criminal law could be regarded, therefore, as a branch of Public law for reasons stated above.<sup>38</sup> To subscribe to Abū Ḥanīfah's view would certainly undermine the sovereignty of the state and would open plenty of leeway for foreigners to abuse the law while there was no opportunity for the state to prosecute them. The same rationale could be said to Abū Yūsuf's view in the sense that it would give a tremendous chances for its citizens travelling abroad to commit a criminal acts and, at times, it could well be against the state itself. The fact that the Muslim judge has no jurisdiction, for the crime committed abroad, would not by itself deny the crime and its punishment.

It should be borne in mind that those three theories are in agreement that the dhimmī, living in dār al-Islām is liable to the same responsibilities for crime as his fellow country-men. Some exception for certain cases, in a specific areas, however, would be extend to the dhimmī as will be seen.

In addition, the majority opinion which says the Islamic Criminal law is applicable for the crime committed outside dār al-Islām by its citizens is still in operation in Saudi Arabia because it follows Ḥanbalī school of law whose opinion concurs with the majority in this case.<sup>39</sup>

We can conclude from the above discussion that there are three major practical legal points which should be observed:

1. The Muslims are now living under separate Muslim sovereigns. Each has its own system of government. Some are apply, to some extent, Islamic law; while many others do not. If, for instance, the Muslims, who are living temporarily in Saudi Arabia for the purposes of trade, labour, performing the pilgrimage etc. commit a crime, the Islamic penal law will be applicable to them, regardless of the citizenship of the convicted.<sup>40</sup> This is because Saudi Arabia enforces the view that the Muslims are obliged to observe the Islamic law no matter where they are so long as they are Muslims and the Muslims are but one nation. This territorial jurisdiction is now also applicable to non-Muslim residents in Saudi Arabia because it follows Ḥanbalī school of law. It is also the trend of the modern notion of sovereignty and the jurisdiction of its territorial law in the West;

2. If the resident of Saudi Arabia, for instance,

living temporarily in Turkey, which has adopted European law, commits a crime of hudūd or qisās, he will not be punished according to the Islamic law in Turkey; perhaps what he did is not a crime at all. When he returns to Saudi Arabia however the jurists differences of opinions that has been highlighted above is applicable here. According to the majority, he will be punished if convicted in a proper trial. For, the majority relies on the persona of the convicted not the territorial nor religious. If the law is deemed applicable, then it will be applied when he returns or wherever possible. By contrast, Ḥanafī jurists maintain that the law shall not be applicable on him for two reasons: <sup>41</sup>

a. The law will be applicable only when there is a de facto not just a de jure jurisdiction; and

b. The Islamic state that applies the Islamic law is called dār al-‘adl proper; the other is quasi dār al-baghy. <sup>42</sup> According to the opinion of the school the crime which occurred in dār al-baghy is not punishable in dār al-‘adl even if the criminal has given his admission (īqrār). For, to them, the requirement for punishment is the ability to carry out the execution of the punishment at the time of the act even though it may be possible at a later time. <sup>43</sup>

3. If there is an agreement between a state which applies Islamic law and a secular Muslim state to the



effect that the former shall not apply the Islamic law on the latter's residents if they are guilty, the agreement is null and void and takes no legal effect. For such an agreement is obviously against the Islamic law itself because it has a clear provision to obstruct the execution of hudūd let alone its ruling. The Prophet is reported to have said: "The Muslims are to abide by their requirements (agreement) except to allow the forbidden and to forbid the permissible."<sup>44</sup>

### C. Classification of Crimes<sup>45</sup>

According to Islamic penal law there are three main categories of criminal acts the violation of which constitutes a punishment. They are:

1. Crimes of hudūd (s. ḥadd, a fixed punishment)<sup>46</sup> such as al-zinā (adultery), al-qadhif (false accusation of unchastity), shurb al-khamr (drinking wine), al-sariqah (theft), al-hirābah or qat'u al-ṭarīq (highway or armed robbery), al-riddah (apostasy); and al-baghy (rebellion against lawful government).<sup>47</sup> This category of crimes can be considered in terms of its impact on the state;

2. Crimes of qisās (retaliation) and diyah (blood-money) such as homicides and injuries which include bodily harm or parts thereof viz. limb, nose, ears, fingers etc. The punishment for these crimes are qisās, diyah or kaffārah (religious expiation).<sup>48</sup>

Qisās means to inflict, as an act of retaliation, on the culprit (exactly) the same act as he did on the victim.<sup>49</sup> This category of crimes and its subsequent category can be considered as against individual; and

3. Crimes of ta'zīr (discretionary punishment). This is a punishment for offences which has no specific provision from the Qur'ān and the sunnah but the authority and judges are empowered to deliver a sentence on the offender in order to maintain law and order in the society.<sup>50</sup> It is not a punishment per se rather, a disciplinary measure (ta'dīb). Perhaps it is for this reason that led al-Māwardī defined ta'zīr as a disciplinary action on offences that God has not prescribed by ḥudūd. The kind of punishment, however, varies depending on the nature of offences and the circumstances of the culprits.<sup>51</sup> Therefore, ta'zīr is a forbidden act that neither God nor the Prophet has fixed a specific punishment for it whether it be over the rights of God or the rights of human being. For instance, not performing a prayer (al-ṣalāt), or fasting, abusing the people, taking usury, breach of trust etc.<sup>52</sup>

It is the prerogative of imām, his deputy, or judges to decide the case of ta'zīr. In discharging his duty, the judge should bear in mind several factors i.e. the severity of the crime and its circumstances, the harm inflicted upon the victim as

well as the society, and the circumstances of the criminal as to his past, his social background etc. All these elements should be considered in passing the sentence of ta'zir.

Finally, it is worthy to note that ta'zir is liable on every man or woman who has attained puberty Muslim or non-Muslim and whether the victim is Muslim or non-Muslim. <sup>53</sup>

#### D. Crime Against the State

Generally speaking, morality and law are essentials for the stability of political and social life of the state. Since Islam seeks to build a society and a political community concurrently based on its ideology, <sup>54</sup> it behoves every citizen to conform to its standards and morality, the violation of which would certainly upset the whole mechanism of the state. It follows that every major crime which occurred on its soil, though there is no pure society in any age, would be considered as against public interest because of its evil and the transgression of the security and the stability of the society. <sup>55</sup> For this reason every crime is deemed to be harmful to the security and integrity of the state as well. Therefore, the state would do its best to uproot the crime and punish the responsible person. But the crime and the criminal continue to exist<sup>5</sup>; some are severe and



some are minor offences.

In Islamic law however, all crimes are regarded as against the public interest, the security of the state and its well-being.<sup>56</sup> But some crimes have a rather more direct impact on the security of the state than others in terms of its nature and consequences such as armed robbery, rebellion and espionage.<sup>57</sup> These are the crimes that jurists have dealt with as crimes against the state. This is not to exclude some other crimes which may have the same effect and might occur from time to time. It is the duty of the authority to decide it in the light of the concept of ta'zīr because the crimes have not been classified as hudūd since there is no textual provision dealing with it.

#### 1. Armed Robbery<sup>58</sup>

Kāsānī defines this crime as "Waiting by the way or highway to rob a traveller of his property using the force of arms so as to obstruct the public on the road." It is immaterial whether the act is committed by an individual or a group and whether they are equipped with the arms or not.<sup>59</sup> The central element of this crime is the act of taking someone's property by force; whereas in theft the basic element is the taking of someone else's property by stealth. The original provision for this act is to be found in the Qur'ān as follows:

The only recompense of those who make war upon God and his Messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom;

Save those who repent before ye overpower them. For know that God is Forgiving, Merciful. 60

The Qur'ān labels the culprit of this crime as muḥārib (pl. muḥāribūn). The punishment for it is in the ḥadd category as stated above.

It is reported that a group of people from the tribes of 'Ukal and 'Uraynah came to Medina and subsequently felt ill. The Prophet advised them to go to the place where the camels of ṣadaqah (charity or alms-giving) were grazing and have some of its urine to cure the disease. Soon after their recovery, they brutally killed the guard of the camels and took the camels away. The Prophet sent some of his Companions after them and they were captured. Then the Prophet punished them by cutting off their hands, feet and gouging out their eyes, exactly as they had done to the camel's guard. 61

There are two conflicting views concerning the link between this case and the verses above. According to Ṭabarī these verses were revealed to inform the Prophet how to punish such a crime after the Prophet had made his own decision. Ṭabarī further reports that

there is a view saying that the Prophet did not gouge out the eyes of the culprits. Qurṭubī says that the punishment of the Prophet was before the revelation of ḥudūd verses.<sup>62</sup> On the other hand, the majority held that those verses were revealed after the punishment had been carried out to reaffirm the decision of the Prophet.<sup>63</sup> At any rate, the decision of the Prophet was in conformity with some of the general rules of the qur'ān in the law of retaliation.<sup>64</sup>

Some jurists, particularly the Ḥanafīs, claim that in order for the muhārīb to be liable for punishment, the victim must be the Muslim or dhimmī. If the victim is musta'min there will be no ḥadd punishment for robbery but ta'zīr would be imposed on him.<sup>65</sup> Their rationale, as has been stated above, is that the inviolability of musta'min's property is in the state of quasi permissibility from the fact that he is the citizen of dār al-ḥarb.<sup>66</sup> For the majority of Muslim jurists however, this view is not only weak but baseless. It is inconceivable that the musta'min, who had been given an amān pact by the Islamic state and thus enjoys the inviolability as to his life and property, would be in the state of uncertainty and no protection from the state. Further, once the amān had been granted it must be respected by all citizens of the Islamic state, and it is comprehensive including the property. Had he not been given the amān and lived



outside the Islamic territory, the case certainly would be different.<sup>67</sup>

The majority opinion is also in line with the concept of justice in Islamic law. Above all, it implants the credibility and the trust in the pact given by the Islamic state. As a result, it can promote international relations, trade, and facilitate the relationship between citizens of different countries.<sup>68</sup>

a. Punishment for Armed Robbery

From the verses quoted above,<sup>69</sup> the jurists have agreed that there are four prescribed punishments for the crime of hirābah, i.e. capital punishment, crucifixion, cutting off the hands and feet on the opposite sides (the right hand and the left foot or vice versa), and banishment or exile. However, the jurists differ concerning inflicting these punishments. But they are in complete agreement about the death penalty.<sup>70</sup>

If the muhārib murders and robs the victim, he would be killed or crucified; if he just murders without robbing, he would be killed; in the event of robbing without killing, his hand and foot would then be cut off on the opposite sides; and if he obstructs on the road or the highway so as to cause fear about the safety of the travellers but neither kills nor

robs the people, he would be banished. This is the view of the most jurists including Shāfi'ī, Aḥmad b. Ḥanbal, and the tendency of Ḥanafī school.<sup>71</sup> As for Mālikī jurists, after agreeing that the criminal must be killed if he murders his victim, they tend to give a freedom of choice to the imām (or judges) in determining the kind of punishments in the event of robbing, that is to say, the judge has an alternative among the three punishments, i.e. killing, crucifixion, and cutting off the hand and foot; if the criminal posing a threat on the road, without killing nor robbing, the judge has an alternative among the four punishments namely, killing, crucifixion, cutting off the hand and foot, and banishment.<sup>72</sup> In short, the jurists differ as to the imposition of punishment according to the nature of crime not according to the nature of the personal character of the criminal. Zāhirī jurists such as Ibn Ḥazm held that the judge had an absolute choice among the four punishments.<sup>73</sup> In addition, Ibn Ḥazm maintains that crucifixion is a separate punishment which should not run concurrently with the rest of punishments. Therefore, if the judge decides to impose this punishment, the criminal would be crucified alive, left until he dies and then buried.<sup>74</sup> When Mālik was asked about this punishment, he replied: "I have never heard of anyone who was crucified except a man called al-Ḥārith who was

crucified in the time of the Caliph 'Abd al-Malik b. Marwān (65/685-86/705) after claiming to be a Prophet.<sup>75</sup> This observation of Mālik indicates that this punishment was prescribed solely to deter the potential criminal in order to prevent the commission of this grave crime by the threat of unusual punishment.<sup>76</sup> Nevertheless, though it is the most severe of all prescribed punishments, the Prophet did not inflict it upon the people of 'Ukal and 'Uraynah as we have pointed out above.



b. Punishment for non-Muslims and its Implications

We have seen earlier that the sphere of criminal responsibility includes both Muslims and non-Muslims alike provided that the act committed is deemed criminal and punishable by law. The criterion is therefore whether the act, not the person, is punishable. This is in addition to the fact that Penal law is the Public law which governs the relationship between the state and individual. When we look upon the act of armed robbery, whether it is against individual or public, it is clear that the crime is against peace and tranquillity of the society as well as the security of the state resulting from the turmoil of public order.

Moreover, there is no proviso as to the religion of the criminal in the verse in question. Hence, religious background is not a criterion in punishing the criminal and it can not be a defence.<sup>77</sup> It is logical therefore that the dhimmī as well as the Muslim will be liable for punishments of hirābah should he commit the crime. This is the view of the majority of the jurists. They held that the dhimmī is obliged to observe the Islamic law because he is the resident of dār al-Islām. Hence, all hudūd punishments are applicable to him except in certain cases such as hadd for liquor.<sup>78</sup>

It entails a fundamental legal question as to the

status of dhimmī after committing this grave crime, i.e. would it impair his contract? The jurists' view are not in agreement over this issue. The Mālikī, Ḥanafī, and Shāfi'ī schools held that the contract remains intact.<sup>79</sup> According to Shāfi'ī, in his drafted proposal of the contract, the act by itself would invalidate the contract.<sup>80</sup> This is also the position of Abū Thawr<sup>81</sup> as well as the Zāhirī school.<sup>82</sup> On the other hand, there are two views from the Ḥanbalī school. The first is that the contract is null and void hence, the dhimmī's life and property would immediately, as a result, become permissible. For, his status is now just like that of ḥarbī. The other view held that the contract remains in operation; thus the dhimmī would liable for punishment like the Muslim.<sup>83</sup> It would seem appropriate that the contract should remain intact because it had been concluded primarily as a permanent one and the dhimmī, by virtue of the contract, has become a permanent resident of dār al-Islām. Hence, any liability, if any, should be treated and punished in the same way as for a Muslim.<sup>84</sup>

As for the musta'min, who commits the crime of hirābah during his stay in dār al-Islām, the Ḥanafī jurists, as we have stated their position earlier, are split among themselves as to whether the musta'min is punishable or not. According to al-Awzā'ī the musta'min is liable for punishment depending on the

nature of crime he committed.<sup>85</sup> It seems appropriate that the musta'min should be liable for the same punishment as the Muslim because the Islamic Penal law is applicable to all people living in dār al-Islām. In addition, the crime occurred within the jurisdiction of the Muslim court.<sup>86</sup> Moreover, crime of any sort is an evil and threatening the stability of society, therefore it is pro bono publico to prevent and punish such a crime, otherwise the society would live at the mercy of the criminals.

## 2. Rebellion (al-Baghy)<sup>87</sup>

Legally speaking, the crime of rebellion is an act of organized armed resistance by a group of people to challenge the authority of the lawful imām (government).<sup>88</sup> They may or may not have a justifiable reason. But from constitutional point of view they are against an established government. It is a political manoeuvre seeking the replacement of the imām through the use of force, hence imposing their will by force rather than peaceful means. Therefore, it is a dangerous crime that could jeopardise the stability of the state. In short, al-baghy means opposing the imām by armed struggle.

According to 'Awdah there are three elements of crime in this act namely, opposing the imām; using the force of arms; and criminal intention, i.e. the



intention of baghy.<sup>89</sup> Those three elements must be clearly seen from their activity in order for them to be judged as bughāt. The act of opposing however, may not be necessarily against the imām himself, but it is sufficient to establish it if they oppose his representatives or his orders.<sup>90</sup>

The law regulating this act is as follows:

And if two parties of believers fall to fighting, then make peace between them. And if one party of them doth wrong to the other, fight ye that which doth wrong till it return unto the ordinance of God; then, if it return, make peace between them justly, and act equitably. Lo! God loveth the equitable.

The believers are naught else than brethren. Therefore make peace between your brethren and observe your duty to God that haply ye may obtain mercy.<sup>91</sup>

There are five principles can be drawn from the verses above:

a. They remain to be the believers despite of the fact that they are bughāt: for the Qur'ān called them the believers;

b. They should be oppressed by any means;

c. If they stop their activities; the operation must be ceased;

d. There will be no additional charge against them if during the fighting they have caused to damage the lives or properties; and

e. The verse permits fighting against those who disregard their duties.<sup>92</sup>

(1) The Punishment for Bughāt

According to the verse cited above the punishment for bughāt is to fight against them if they overtly show disloyalty or resist the imām, disregard their duties and prepare to launch resistance. It is the same punishment whether they have appointed their imām or not.<sup>93</sup> The Ḥanafī school held that the imām should fight them immediately even though they have not started the attack. For, the fact that they have assembled and doing necessary preparation for the war is a prima facie to demonstrate their intention. Thus, it is necessary to launch the attack on them before they become stronger and eventually would be difficult to annihilate them.<sup>94</sup> However, before launching the attack, the imām should warn and call on them so that they may return to the fold.<sup>95</sup> This is precisely what 'Alī b. Abī Ṭālib has done to Khawārij<sup>96</sup> when he sent 'Abdallāh b. 'Abbās to try to mediate them. As a result, some of them withdrew to 'Alī. For those who remained unconvinced 'Alī said: "We still honour you three things: we shall not stop you entering the mosque; we shall not begin fighting (you); and we shall not deprive you of your share of fay' so long as you are with us."<sup>97</sup>

Al-Māwardī suggests that the imām while in the course of fighting bughāt, should not get the assistance from non-Muslims whether mu'āhid or

dhimmī.<sup>98</sup>

If for any reason, the bughāt return to the fold (jamā'ah) and pronounce their loyalty to the imām, the operation against them must be ceased.<sup>99</sup>

#### (11) Punishment for non-Muslims

In the event of the dhimmī being involved in the crime of baghy there can be two separate cases namely; either they commit it by themselves or they join Muslims bughāt. It is immaterial here whether the Muslims have recourse to their assistance or vice versa and the degrees of their assistance.

##### The First Case

The opinion of the schools are almost unanimous that by the commission of the act, the contract is dissolved. This view was held by Ḥanafī, Shāfi'ī, and Ḥanbalī schools.<sup>100</sup> As for the opinion of the Mālikī school they express two separate cases for the dhimmīs viz. if the dhimmīs fight against injustice, their contract is not dissolved; but if they fight for no cause, their contract certainly will be dissolved.<sup>101</sup>

##### The Second Case

The Ḥanafī jurists held that the dhimmī would be punishable according to the provision provided for the crime but his contract would remain unaffected. They contend that the position of dhimmī in this case is just like that of Muslims. Since the Muslim remains in



his faith despite his act so does the dhimmī with respect to his status.<sup>102</sup>

There are two opinions reported from Shāfi'ī and Ḥanbalī schools respectively. The first view is that the contract is void as in the case of the dhimmī fighting the Muslims by their own. Consequently, the dhimmī will revert to his status of ḥarbī.<sup>103</sup> They further contend that if the dhimmīs claim that they have been forced to join the rebels, the contract is not void. The same applies if the dhimmī believe that they have to join the rebels.<sup>104</sup> By contrast, the second view held that the contract is unavoidable because the dhimmī, in so doing is not in the position to know who is right and who is wrong in the conflict; in other words he is actually in the state of doubt (shubḥah). It is an established principle that in criminal matter, or in any legal judgement, the accused can not be prosecuted if there is a doubt about the case in question. The principle derived from the Tradition of the Prophet which says that: "Ward off the ḥudūd by doubts."<sup>105</sup> It follows that according to this second view, the punishment for the dhimmī is identical to that of Muslim rebels (ahl al-baghy as opposed to ahl al-'adl or ahl al-ḥaqq). However, this view argues that the dhimmī, in this case, is responsible for any damage that he has done to the Muslims during the fighting or without the fighting

whether it be civil or criminal damages, be it to life, bodily injuries or properties.<sup>106</sup>

It seems appropriate that the dhimmī should be treated as the Muslim rebels in this case since he is the inhabitant of dār al-Islām and the contract, once concluded, is for life. The famous saying of 'Alī can be cited here that "For him (dhimmī) whatever [things] for us and against him whatever [things] against us".<sup>107</sup> Therefore, there should be no room for unequal treatment between the Muslim and the dhimmī rebels in whatever aspect it might be.

As for the musta'min, if he renders assistance to the Muslim rebels, whether he is asked or otherwise, his pact will be voidable and he would become harbī. If he claims that he is forced to join the rebels, the burden of proof is on him. This is the opinion of the Shāfi'ī and Ḥanbalī schools.<sup>108</sup> On the other hand, the Ḥanafī jurists held that the contract is unvoidable like the position of dhimmī above. However, if the musta'min fights the Muslims alone all schools agreed that the amān pact is void.<sup>109</sup>

It should be noted that Saudi Arabia, whose official school is Ḥanbalī, has made a provision that whosoever, has been granted Saudi nationality by naturalization, and commits, or is an accomplice to, a crime against the security of the state or has been convicted of criminal act, will loss his nationality

if the government deems proper, within the period of five years from the date of his naturalization.<sup>110</sup> This provision clearly conforms with the law of baghy according to Ḥanbalī school in respect of dhimmī.

### 3. Espionage Crime (tajassus)

It can be defined as an activity seeking to obtain secret information about the affairs of the Muslims and the Islamic state and pass it to the enemy.<sup>111</sup> There is no doubt that this clandestine activities is a grave crime that will jeopardise the security and safety of the state especially during the war-time.<sup>112</sup> In the modern context this can involve the use of sophisticated technological means not only in military affairs but also in economic, trade, and industrial matters. Many new developments in spying have taken place including using the satellite as a medium of spying activity.<sup>113</sup>

In Islamic history however, there was a report from several authorities that when the Prophet decided to take over Mecca, Ḥāṭib b. Abī Balta‘ah sent the message to Quraysh informing them about the Prophet preparation through a woman. The letter was intercepted, and he confessed the truth. Thinking that Ḥāṭib was a traitor, ‘Umar asked permission from the prophet to cut his head off. But the Prophet disagreed and replied: "How do you know ‘Umar? Perhaps God looks



favourably on those who joined the battle of Badr (aṣḥāb al-Badr) and said, 'Do as you please, for, I have forgiven you.'"<sup>114</sup> According to some authorities, the Prophet's reluctance was in order to acknowledge Ḥaṭīb's participation in the decisive battle of Badr. He was forgiven as he told the truth and his motive did not appear to be heinous and a hypocrite.<sup>115</sup> However, the Prophet's decision gave rise to a conflict of opinions among the jurists as to what to do with the Muslim spy.

The Qur'ān warns the Muslims not to engage in the spying activity. It says:

O ye who believe! Shun much suspicion; for lo! some suspicion is a sin. And spy not, neither backbite one another. Would one of you love to eat the flesh of his dead brother? Ye abhor that (so abhor the other)! And keep your duty to God. Lo! God is relenting, Merciful.<sup>116</sup>

The Qur'ān condemns those who engage in that activities and used a metaphorical language in order to appeal to man's emotions as well as his reason.

Clearly that the act of espionage is forbidden in Islam. The verse above speaks clearly to this effect. The jurists are not in agreement as to what punishment should be inflicted on the Muslim if he is caught spying against the Islamic state. The Ḥanafī school held that the man should be punished by torture and long imprisonment until he repents.<sup>117</sup> On the other

hand, Mālikī jurists such as Ibn Qāsim and Saḥnūn are of the opinions that <sup>the</sup> a man should be killed and no repentance should be sought from him.<sup>118</sup> Shāfi'ī maintains that since the crime is not under ḥudūd category, it certainly would fall under ta'zīr and it will be left to the ijtihād of imām to decide the proper punishment.<sup>119</sup>

#### a. Punishment for non-Muslims

It is understood that the non-Muslims who are the residents of the Islamic state, whether dhimmī or musta'min, are bona fide residents. If a dhimmī is caught or involved in the espionage activity against the Islamic state the jurists have expressed two views with respect to his contract.

The first view is that his contract becomes void thus, he will be treated like ḥarbī. This is the opinion of 'Awzā'ī, Mālikī and some Ḥanbalī jurists.<sup>120</sup> 'Awzā'ī says that the imām could either kill or crucify him.<sup>121</sup>

On the other hand, the second view held that the contract is not void. He is punishable like the Muslim spy and should not be killed. This is the opinions of Ḥanafī and Shāfi'ī schools.<sup>122</sup> They maintain that since the Muslim spy has not lost his faith the same is the case for the dhimmī with respect to his contract. It would seem appropriate that the dhimmī

should be treated and punished like the Muslims as has been stated above. But, it should be recalled that since there is no prescribed punishment for the crime in the texts, i.e. the Qur'ān and sunnah, the crime would certainly fall under ta'zīr punishment. The area of ta'zīr however is so broad that the imām can exercise his power, according to the principle of public interest (maṣlahah), ranging from killing to as light a punishment as a reprimand.<sup>123</sup> There are two reports saying that the Prophet used to order his Companions to kill the spy who had been arrested and fled.<sup>124</sup>

The jurists are also split concerning the musta'min who happens to be a spy. While Ḥanafī and Shāfi'ī held that his amān is not affected because the musta'min takes the rule of a dhimmī;<sup>125</sup> Mālikī says that his amān pact is void.<sup>126</sup> For the contract is concluded on the understanding that he display good conduct and not pose a threat to the state. As for the punishment of musta'min spy, it seems that the view of Abū Yūsuf, that is to be killed, is more relevant to the present situation where we find that most modern legislations treated spying as a capital crime.<sup>127</sup>

Finally, it should be noted that the ultimate objective of the Islamic law, including the penal law, is to preserve the five necessities in human life, namely, religion, life, mind, property, and



progeny.<sup>128</sup> So, if one examines closely into every piece of Islamic law, it should be found that the law is promulgated either to promote or to preserve one of these five necessities.

#### E. Crimes Against Individual

The jurists divide these crimes in a variety of categories. But all agree that at least there are three kinds of homicide namely, al-'amd (deliberate intent or murder), shubh al-'amd (quasi-deliberate intent or manslaughter), and khaṭa' (accidental or mistake).<sup>129</sup> In Islamic law, the crime of homicide is considered as a major crime. In religious terms it is one of the grave sin (kabā'ir). The first homicide in human history as revealed by the Qur'ān was between the two children of Ādam.<sup>130</sup> The punishment ordained in Islamic law for homicide and the infliction of injury or wound is called qisās or qawad (retaliation) that is to inflict exactly the same act on the convicted as he did to the victim.<sup>131</sup> Alternatively, there is diyah (blood-money) or kaffārah (religious expiation).

##### 1. Historical Background

The concept of retaliation, however, was not a product of Islam. It prevailed in pre-Islamic Arabia where every tribe was busy fighting each other for

vengeance (tha'r)<sup>132</sup> and for the sense of tribal pride. Revenge was taken not only against the killer but also against any member of killer's tribe. This state of affairs would continue even resulting from a trivial reason and would take years of enmity.<sup>133</sup> It was under this circumstance that Islam introduced the law of qisās.

The Qur'ān radically altered the legal incidents of homicide. Henceforth, only one life, the life of the murderer himself, was due for the life of the victim. The term tha'r therefore being replaced by that of qisās (just retaliation).<sup>134</sup> This is not the only case, particularly in the domain of law, where the Qur'ān came to modify the existing practice of pre-Islamic Arabia in order to align it with its standards of ethical justice. Hence, the status quo is tacitly amended unless it is expressly ratified. In this case the maxim of a life for a life itself stems from the broader religious principle that all Muslims are equal in the sight of God.<sup>135</sup> It follows that the requirement for just retaliation allows only one life to be taken, the life of the murderer, irrespective of the social status of the victim.<sup>136</sup> This is also the position of Islam with respect to diyah. Although, it was known among the Arabs as a peaceful alternative to continuous revenge, the amount agreed upon varied depending on the individual's position in his

tribe.<sup>137</sup> Such a practice was not only unjust, it was also immoral. Therefore, according to Islam, the maximum amount of money should be fixed for all persons irrespective of his social status.

It is a major departure, brought by Islam, from what had been practiced by the Arabs with respect to the concept of qisās. In addition, in the law of qisās, as an alternative to the pre-Islamic practice, Islam allows the victim or his nearest relative three options: first, the right to demand the execution of qisās against the murderer; second, the right to pardon the murderer in return for his paying the fixed amount of blood-money; and third, the right to pardon him for the sake of God.<sup>138</sup> For the Muslims believed that the true reward, in this situation, is the reward from God in the Hereafter. The Qur'ān and the Prophet have repeatedly encouraged the parties concerned to resort to this last choice.<sup>139</sup> This will illustrate the bond of continuity between the temporal life and the life to come. Alternatively, the least of all, the combination of diyah and forgiveness produces a powerful material and spiritual inducement to forsake qisās.<sup>140</sup> However, if the culprit is pardoned in accordance with the principles discussed above, he probably would still facing ta'zīr punishment from the authority. It is for this reason, perhaps, that Mālik, Layth, and Awzā'I say that the accused despite having



been forgiven, should be flogged one hundred lashes and jailed for a year.<sup>141</sup> It should be noted that the concept of pardon in the Islamic penal law is not in harmony with the modern notion of Western oriented legal systems. It appears to be that Islamic penal law of homicide is a crime purely against individual; the remedy for which is the concern of the victim and his relatives. But as has been pointed out earlier, at the outset of this investigation, that every crime in Islam is considered as against society. Hence the state, for a simple reason, that it is not only interrupt the personal life of the victim and his family, but it threatens the peaceful and harmonious life of the society as a whole.<sup>142</sup> For it is the primary message of Islam to bring peace and order, and to enjoin good and forbid evil. It was under these principles that the Islamic penal law was prescribed and it should be understood accordingly.

## 2. The Law of Homicide

As has been said earlier, the punishment for homicide and the inflicting injury in Islamic penal law could be either qisās,<sup>143</sup> whether for homicide or maiming, or diyah and kaffārah. The last two usually are used in cases of accidental homicide.

The law concerning the qisās for deliberate homicide is as follows:

O ye who believe! Retaliation is prescribed for you in the matter of the murdered; the freeman for the freeman, and the slave for the slave, and the female for the female. And for him who is forgiven somewhat by his (injured) brother, prosecution according to usage and payment unto him in kindness. This is an alleviation and a mercy from your Lord. He who transgresseth after this will have a painful doom. And there is life for you in retaliation, O men of understanding, that ye may ward off (evil).<sup>144</sup>

As for the accidental homicide we read:

It is not for a believer to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake, must set free a believing slave, and pay the blood-money to the family of the slain, unless they remit it as a charity....<sup>145</sup>

From the verses above, the jurists laid down the principle that there will be no qisās, as the verses suggest, for accidental homicide, but the blood-money and penance, or kaffārah is required.<sup>146</sup>

Qisās can only be executed in the case of deliberate or intentional homicide.<sup>147</sup> According to Kāsānī the amount of blood-money in the time of the Prophet was one hundred camels or one thousand dinār. The diyah of the woman being half of the man. This proportion, however, was also the consensus of the Companions including 'Umar I, 'Alī, Ibn Mas'ūd, and Zayd b. Thābit. According to Ḥanafī school there is no disparity as to diyah of non-Muslims with that of Muslims.<sup>148</sup> In the case of accidental or quasi-deliberate homicide, the blood-money is to be paid by

the family (‘āqilah) of the killer in three years.<sup>149</sup>

The kaffārah, however, mixtures a sense of penitence and repentance and it usually takes in the forms of manumission (‘itāq), in the past, of the Muslim slave, if one can afford it.<sup>150</sup> Alternatively, fasting for a period of two months consecutively.<sup>151</sup> It is a unanimous agreement of the jurists that kaffārah is prescribed for accidental homicide together with diyah.<sup>152</sup>



### 3. The Power to Carry Out the Execution of Qisās

The Qur'ān says:

And slay not the life which God hath forbidden save with right. Whoso is slain wrongfully, we have given power (authority) unto his heir, but let him not commit excess in slaying. Lo! he will be helped.<sup>153</sup>

According to Zamakhsharī the verse above clearly indicates that the power to demand the execution for qisās against the murderer rests with the victim's heir or next of kin; if the victim has no legal heir,<sup>154</sup> then the imām acts as his heir or legal guardian and carries out<sup>155</sup> the qisās against the convicted.<sup>156</sup> Therefore, it is the right of the victim's heir to exercise his power or authority (sultān), as expressed by the Qur'ān, to demand qisās; otherwise qisās cannot be legally executed. On this the jurists have no disagreement. Further, the jurists say that when qisās is demanded and the murderer is properly convicted, it is the right of the heir to carry out the qisās and he should not be deprived of this right if he is capable of doing so, in the proper way, except in the case of qisās of the injuries. For it needs a special skill to carry it out. It is for the best interests of both parties to delegate it to the surgeon in the case of injuries. This is the opinions of the four schools.<sup>157</sup>

However, the relatives of the murdered person can

delegate the power of qisās to someone else. But all of them should be present to witness the execution. For, it is hoped that they or one of them would declare pardon at the last moment. Or, perhaps the absent (relative) has already given his pardon.<sup>158</sup> For the right to forgive belongs to every member of the victim's family including husband and wife. If anyone of the heirs, who has sound judgement, pardons the murderer, the rest of the family must concur and qisās is no longer carried out on the convicted.<sup>159</sup> This is the majority view of the jurists including 'Aṭā, Nakha'ī, Thawrī, Abū Ḥanīfah, Shāfi'ī, Aḥmad b. Ḥanbal and others.<sup>160</sup>

The question to be decided now is whether the state, rather than the grieved party, should have the power to carry out the qisās. It has been stated that the jurists have expressed their concern about the viability of the heirs, as to the experience and the skill, in carrying out the qisās, though it is primarily their right, especially in the injuries. The prevailing view (rāiḥ) among the jurists is not to allow the heir to carry out the injurious qisās.<sup>161</sup> It is this reason, perhaps, which gave rise to the idea of delegation which has been recognised by most jurists. Delegation (wikālah) is by no means an alien concept in Islamic law. The party to be entrusted, therefore, in this respect is the state as an agent

for the heirs. All they need to do is to give their consent to the agency of the state, as the law enforcing power, in carrying out the qisās on their behalf. This solution is not against the spirit of the verse above. On the contrary, it is the necessity of the time where it is observed that all the means of the execution is in the hand of the state. In the past, everyone knew how to use weapons but that situation hardly exists now with the restrictions against having weapons imposed by the state. Therefore in one way or another the state has to intervene in the execution of qisās through its machinery. Therefore, according to 'Awdah it is the necessity of the day to prevent the heirs of the victim from carrying out qisās by their own.<sup>162</sup> It is the state's responsibility to appoint experts to carry it out. The heirs should give their consent for qisās or pardon if they wish.<sup>163</sup> According to Shāfi'ī the experts should get their pay from the state as the judges do.<sup>164</sup> It is clear that the task of the execution itself has become the state's responsibility for reasons stated above. This view is held by all the contemporary writers on the subject.<sup>165</sup> According to El-Awa, "the strongest evidence used to support this view is that in the Qur'ān qisās is described as the duty of the Muslim community, which cannot be carried out except through a representative, who would be, in this case,



the judge or ruler."<sup>166</sup> To support his argument, El-Awa quoted the opinion of Shaltūt who says that, "the duties of the community in Islam are two-fold. First, there are the duties obligatory for each individual (fard 'ayn) such as prayer, fasting, and alms-giving; second, there are those carried out by a representative acting on behalf of the community (fard kifāyah), since it is impossible for each Muslim to perform them individually. One of these duties is the carrying out of qisās when it is demanded."<sup>167</sup>

#### 4. Some Disputed Points

In the matter of qisās, there are several disputed points among the jurists such as the execution of qisās against a father who kills his son, against a group of several people who kill a single person, and against a Muslim who kills a non-Muslim or vice versa. Since our subject of enquiry is only concern the relationship between Muslim and non-Muslim, we shall only deal with the last point.

##### a. Qisās Against a Muslim for killing a non-Muslim

In the event of a Muslim intentionally killing a dhimmī or musta'min, the jurists are split as to whether the law of qisās is applicable to him. Their opinions can be summarised into three groups:

(1) The Muslim is not liable to qisās whether he

kills a dhimmī or musta'min. This is the majority opinion of jurists including Mālikī, Shāfi'ī, Ḥanbalī, Zāharī and others.<sup>168</sup>

(ii) The Muslim is liable to qisās. This is the view of Ḥanafī school. But Abū Yūsuf holds that the Muslim is also liable for qisās if he kills musta'min. It is a major departure from the opinion of the school.<sup>169</sup>

(iii) The Mālikī school and al-Layth say that if a Muslim kills a dhimmī by way of deceit (ghīlah), only then would the Muslim be killed. The punishment in this case is solely for his evil not for qisās. They further contend that if the victim's relatives have forgiven the killer, the forgiveness is not considered, and the killer would still be killed.<sup>170</sup> It appears that in cases of ghīlah the musta'min also should be considered, in this context, as a dhimmī for the term non-Muslim (kāfir) usually denotes a musta'min but not harbī as has been discussed above.<sup>171</sup>

The majority view is supported by the Qur'ānic verses which declare that non-Muslims are not equal to Muslims<sup>172</sup> and by the tradition which says that the Muslim should not be killed for the killing of non-Muslim.<sup>173</sup> The majority further contends that there is a consensus among the scholars that the Muslim will not be prosecuted if he murders musta'min. Therefore

the same condition is applied to dhimmī.<sup>174</sup> To support their arguments the majority quoted a Tradition which says that "the bloods of Muslims are equal". Hence, it implies that there is no equality between the blood of a Muslim and a non-Muslim. For one of the requirements of qīṣāṣ is equality between the two parties. Since there is no equality in this case; the qīṣāṣ should not be carried out.<sup>175</sup>

On the other hand, the Ḥanafī jurists maintain that the tradition in question, which forbade the qīṣāṣ of a Muslim for non-Muslim, is meant for killing of non-Muslim ḥarbī whose blood is not inviolable and a subject of agreement among the schools. Therefore, what is meant by the tradition was the killing of ḥarbī because the dhimmī is to be killed should he kill another dhimmī but not in the case of ḥarbī killed by a Muslim or dhimmī. As to the consensus alleged by the majority, it has been pointed out earlier that Abū Yūsuf says otherwise and the opinion of Ḥanafī school tend to consider the inviolability of musta'min as temporal which is by no means tantamount to that of a dhimmī with respect to his contract.<sup>176</sup> In terms of inequality raised by the majority, the Ḥanafī jurists hold that difference of religion stands no barrier in qīṣāṣ. In other words the faith of the party is not a prerequisite for carrying out qīṣāṣ.<sup>177</sup> This could be seen from the fact that if a dhimmī



murders another dhimmī, the murderer would still be liable for qīṣāṣ though he has become a Muslim despite the fact that the religions of both parties are now is not identical.<sup>178</sup> Therefore, the equality in all aspects is not a condition for qīṣāṣ as in the cases of learned and ignorant, male and female, handicapped or otherwise etc. As to the tradition which says that the blood of Muslims is equal, the Ḥanafī jurists say that the equality rendered in the tradition was among the Muslims themselves so as not to be treated differently between the rich and the poor, the noble and the common or the like. There is no evidence to suggest that it was to discriminate between Muslim and dhimmī.<sup>179</sup>

In addition to their response to the majority view, the Ḥanafī jurists support their position by arguing that in the application of the general meaning of the Qur'ānic verses pertaining to qīṣāṣ there is no discrimination between a Muslim and a dhimmī.<sup>180</sup> The faith of the party, however, plays no role in the application of qīṣāṣ. Further, they contend that the Prophet is reported to have said: "The life of a Muslim can only be taken in three cases: the case of a married person who commits adultery; one who has killed a human being; and one who has forsaken his religion and left his community".<sup>181</sup> From this tradition, one can conclude that the Prophet simply

mentioned, the victim was a human being including Muslims and non-Muslims alike.<sup>182</sup> In addition, it was reported that the Prophet ordered the prosecution of a Muslim for the killing of a dhimmī.<sup>183</sup> The same was reported from 'Umar I, 'Alī, Ibn Mas'ūd and 'Umar II.<sup>184</sup> It is further argued that the implementation of qīṣāṣ was, among other things, for the preservation of human life. This end could also be achieved by the application of qīṣāṣ as between Muslims and dhimmī.<sup>185</sup>

On the other hand, it was reported that Mālik said, "What is done in our community is that a Muslim is not killed for a non-Muslim unless the Muslim kills him by deceit. Then he is killed for it."<sup>186</sup>

Having exposed all arguments and evidences of each school, it seems that the opinion of the Ḥanafī school is more relevant to the general spirit of the Qur'ān especially the verses pertaining to qīṣāṣ. To confine the application of qīṣāṣ to cases involving the killing of Muslims alone would contradict the principle of the law of qīṣāṣ itself, for this law was made in order to protect human life, and if one imposes such a limitation on it, it is a clear contradiction of its purposes.<sup>187</sup> Moreover, the Ḥanafī school rightly holds that the equality, in this context, means that both parties must be human being; therefore, if any human being kills another human being, the killer is liable to qīṣāṣ irrespective of

the faith of the victim. As for the Qur'ānic verses cited by other schools to support their position that there is inequality between the Muslims and non-Muslims, they all relate to the Hereafter, hence none of them is relevant to the issue in question.<sup>188</sup> In addition, the Tradition cited by the majority needs an explanation. According to Jaṣṣāṣ the explanation given by Ḥanafī school is harmonious with the general spirit of Islamic law rather than that given by the majority.<sup>189</sup>

Moreover, another argument which supports the Ḥanafī's view is that there is a complete consensus among the jurists that if a Muslim steals a non-Muslim's property and he is convicted, the Muslim's hand is to be amputated.<sup>190</sup> The reason was for the protection of non-Muslim's property and the prohibition of stealing. It is a paradox that the majority would favour and grant more protection to the property of a non-Muslim than his life.<sup>191</sup> It may be defended on the grounds that the punishment for theft is the right of God whereas qisās is the right of human being.<sup>192</sup> Such an objection is not valid for the simple reason that the prescription of theft punishment, besides being the right of God, is essentially for the protection of property.<sup>193</sup> It seems that by upholding the contract of dhimmaḥ, it is sufficient to prosecute anyone who kills a dhimmī for



no reason. It is also a major deterrent to safeguard the life of the dhimmī against unwarranted homicide. This is the trend of the contemporary scholars who advocate consistency in applying the rule of law to all parties.<sup>194</sup> The difference of opinions among the jurists however is no more than a matter of difference interpretation of the texts in question. Finally, it should be noted that the view of Ḥanafī school, in this respect, is in line with modern legislations which make no difference in punishment among the people of different religions.<sup>195</sup>

##### 5. Qīṣāṣ for Killing a Musta'min

It has been pointed out earlier that it is only Abū Yūsuf, in variance with his school and majority's opinion, who says that the Muslim would be liable for qīṣāṣ if he deliberately kills musta'min for no valid reason.<sup>196</sup> Abū Yūsuf strongly defends his position by saying that once an amān has been granted to an alien, his inviolability, as to his life and property, is guaranteed by the state. If he is murdered, during that period and within the Islamic territory, he still enjoys this inviolability at the time of the act. This is sufficient, according to Abū Yūsuf, to prosecute his murderer even though the culprit is a Muslim. But the majority holds that the musta'min enjoys only temporary inviolability during his stay in dār al-

Islām, hence there is no equality in terms of inviolability and no qīṣāṣ is prescribed.<sup>197</sup> In fact, Abū Yūsuf's view commands considerable weight. According to Zaydān, Abū Yūsuf's view should outweigh that of the majority for these reasons:

a. The standpoint of Ḥanafī school is that no equality is required in the punishment of qīṣāṣ.

b. The musta'min has been granted amān status. By virtue of the pact, he will be protected by the state. If there is no qīṣāṣ for him, the protection is not conclusive. Consequently, his life is always insecure and would be contrary to the principle of amān itself. On the other hand, if qīṣāṣ is applicable the state has naturally fulfilled its commitment which is required by Sharī'ah.

c. It is in the interest of the state as well as the requirement of the doctrine of siyāsah<sup>198</sup> in the present situation to apply qīṣāṣ in this case though the murderer is a Muslim. This is in order to promote stability, preventing the spread of crime and to implant the sense of credibility in the Islamic state. All these elements would certainly contribute to the public interest which is enjoined by the Sharī'ah.<sup>199</sup>

d. As has been said earlier, there can be a wide range of punishment under the provision of ta'zīr. Some jurists such as Mālik and some Ḥanbalī jurists say that the punishment of some crimes under ta'zīr

could also be as severe as killing.<sup>200</sup> So if the Muslim kills musta'min, the authority could very well punish the murderer by death penalty not on the basis of qisās but ta'zīr and siyāsah.<sup>201</sup>

#### 6. Qisās Against Dhimmī

There is a complete agreement among the jurists of different schools that if a dhimmī deliberately kills another dhimmī or a Muslim, the murderer is liable for qisās.<sup>202</sup> This is because the inviolability of the dhimmī is forever so long as he remains as a dhimmī.<sup>203</sup> There is no difference in punishment whether the victim is male or female and whether the parties come from the same faith.<sup>204</sup> It was reported the Prophet ordered the killing of a Jew who had killed a female slave from anṣār.<sup>205</sup> The Qur'ānic provision also has made no distinction in the matter of qisās between male and female.<sup>206</sup>

As for the life of a Muslim it is generally accepted that its inviolability is absolute. It is argued that if a dhimmī is killed for a dhimmī, the qisās for a Muslim is more discernible.<sup>207</sup> According to the Zāhirī view the killing of dhimmī in this case is not really for qisās but for the breach of a contract by the act of killing a Muslim.<sup>208</sup>

If a dhimmī kills an apostate, the jurists say he will not be killed, for the apostate has lost his



inviolability. His status is now like that of ḥarbī.<sup>209</sup> The dhimmī however should be held responsible under ta'zīr punishment because of the fact that he has taken the law into his own hands.<sup>210</sup> If the imām has issued an instruction prohibiting the killing of the apostate, but the dhimmī deliberately kills the apostate despite the instruction, it seems that the dhimmī, in this case, should be killed.<sup>211</sup>

If a dhimmī kills a musta'min, the majority holds that he is liable for qīṣāṣ. For the musta'min enjoys the protection under the amān pact.<sup>212</sup> On the contrary, the Ḥanafī says that the dhimmī could not be held responsible because the inviolability of musta'min is not absolute but depends on the period of his stay in dār al-Islām.<sup>213</sup> On the other hand, Abū Yūsuf, together with the majority, maintains that the musta'min enjoys the inviolability at the time of the commission of the crime.<sup>214</sup> The fact that he enjoys temporal inviolability does not make any difference, for his status might become permanent if he becomes a dhimmī. The criterion of inviolability therefore should be based on the time factor rather than on the status of the parties concerned. Furthermore, to subscribe to Ḥanafī view would jeopardise the life of musta'min and would therefore be contrary to the concept of amān which had been given to him by the imām.<sup>215</sup>

If a dhimmī kills a ḥarbī who has no amān, there will be neither qīṣāṣ nor diyah nor kaffārah against him. This is the opinion of all schools. According to Ibn Qudāmah, "We know of no disagreement among the jurists over this issue."<sup>216</sup>

Finally, if a musta'min deliberately kills a Muslim or dhimmī or musta'min, there is no disagreement among the jurists as to the liability of the murderer for qīṣāṣ. This is because each victim enjoys his own inviolability whether by faith or amān.<sup>217</sup> According to the Ḥanafī jurists the musta'min is presumed to have accepted the rule of Islam pertaining to the right of human beings. Since qīṣāṣ falls within those rights, the musta'min is therefore liable for qīṣāṣ.<sup>218</sup>

On the other hand, if a musta'min kills a ḥarbī, there will be no qīṣāṣ against him because there is no amān for ḥarbī. In the event of musta'min killing an apostate, it appears that the rule for the dhimmī would be applicable to him since both of them live in dār al-Islām.<sup>219</sup> This would mean that the musta'min would not be liable for qīṣāṣ but he would probably face ta'zīr punishment from the authority.<sup>220</sup>

Finally, the law of qīṣāṣ pertaining to injuries will not be dealt here because of its similarities in principles and applications to qīṣāṣ for the taking of life.

#### F. Unlawful Sexual Intercourse (al-zinā)<sup>221</sup>

Generally speaking, in a modern penal system sexual intercourse outside marriage by consenting adults is not considered as a crime. Such sexual freedom is completely unknown to all revealed laws. The Mosaic, the Christian, and the Islamic laws all forbid all types of sexual relations outside marriage and in the case of Judaism and Islam there is also punishment for it.<sup>222</sup>

In Islamic law however, where most of its rulings signified moral values, unlawful intercourse is one of the graves crimes which falls under hudūd punishment. This is a basic difference between Islamic law and Western legal system. In view of its evil and the chaotic consequences which come from it, the Qur'ān not only prohibited the act per se but any circumstances that leads to it was also prohibited as we read: "And come not near unto adultery. Lo! it is an abomination and an evil way."<sup>223</sup> For it leads to many evils. It destroys the family structure and it works against the interests of the children born or to be born.

The jurists differ as to the definition of zinā but they all agree that the main element in this crime is unlawful intercourse. Perhaps the most comprehensive definition is the one that is given by the Ḥanafī school: Unlawful sexual intercourse which



takes place between a consenting man and woman in dār al 'adl when committed by those who abide by Islamic law, when there is no legal right (to it) or the semblance of such a right (al-milk or shubhat al-milk).<sup>224</sup> It follows that any sexual relationship between a man and a woman which does not involve intercourse does not constitute a zinā hence, it is not punishable by ḥadd but it would involve another category of punishment.<sup>225</sup>

#### 1. The Punishment of Zinā

The Qur'ān laid down its punishment as follows:

The adulterer and the adulteress, scourge ye each one of them (with) a hundred stripes. And let not pity for the twain withhold you from obedience to God, if ye believe in God and the Last Day. And let a party of believers witness their punishment.<sup>226</sup>

The earlier revelation concerning the crime of zinā was as follows:

And as for those of your women who become guilty of immoral conduct, call upon four from among you who have witnessed their guilt; and if these bear witness thereto, confine the guilty women to their houses until death takes them away or God opens for them a way (through repentance). And punish (them) both of the guilty parties; but if they both repent and mend their ways, leave them alone: for, behold, God is an acceptor of repentance, a dispenser of grace.<sup>227</sup>

According to some commentators these two verses have been abrogated by the verse 24:2 above which

henceforth becomes the only basis for punishment of zinā.<sup>228</sup> It is clear therefore that the punishment for zinā in the beginning of Islam was a form of ta'zīr and it evolved and remained to become a ḥadd punishment at later stage. The form of ḥadd however varies depending on the marital status of the culprit.<sup>229</sup> This opinion expressed by 'Ubādah, al-Ḥasan b. al-Baṣrī and Mujāhid.<sup>230</sup> As for the kinds of punishment for zinā it can be summarised as follows:

a. Flogging

One hundred lashes is prescribed for the unmarried male or female who commit fornication. This is in accordance with the verse 24:2 above. There is no disagreement among the jurists over this issue.<sup>231</sup>

b. Stoning to death (al-rajm)

This was prescribed by the sunnah for the married male and female. Hence it became the consensus of the Companions. It is a subject of agreement among all schools except those of khawārij.<sup>232</sup> It was agreed among the scholars that the punishment of stoning is only prescribed on the married (muḥṣan) male or female and there are some requirements to be a muḥṣan which are the subject of disagreement among the jurists.<sup>233</sup>

Moreover, the Qur'ān commands that the execution of these two punishments, i.e. flogging and stoning, should be carried out in public by the authority in order to deter potential offenders. This can be

understood from the last portion of the verse which says that "let a party of believers witness their punishment." Apart from that it should be borne in mind that in all cases of alleged sexual transgressions or misbehaviour the Qur'ān stipulates the direct evidence of four witnesses, instead of two witnesses which is required in all other judicial cases, as a sine qua non of conviction.<sup>234</sup>

On the other hand, if stoning has been decided the majority held that flogging is no more required; otherwise it would cause double punishments on the same person for the same offence, something that would be contrary to the principle of punishment.<sup>235</sup> But the Ḥanbalī and Zāhirī maintain that the culprit should still be flogged and then stoned to death.<sup>236</sup>

#### c. Banishment

This punishment is prescribed for the unmarried offenders. It means that the culprit should be expelled from the place where he had committed the act for a period of one year.<sup>237</sup> Again this issue of banishment together with flogging is a matter where there is a difference in opinion among the jurists. The majority held that it is prescribed by the Sunnah in addition to flogging. This opinion was reported from the Four Guided Caliphs and later shared by al-Thawrī, Ibn Abī Laylā, Shāfi'ī, Abū Thawr and others.<sup>238</sup> The Ḥanafī jurists held that there should



be no banishment together with flogging except in the cases where the imām deems there is an interest in the banishment. In this case it would be ta'zīr rather than ḥadd.<sup>239</sup> On the other hand, Mālikī jurists and Awzā'ī maintain that the banishment is only for the male. This is because female would need special care and protection.<sup>240</sup> After examining the evidences of each school, it seems that the majority view is more acceptable. However, according to some, the idea of banishment, as in the case of ḥirābah, could signify and properly include imprisonment as the term literally implies.<sup>241</sup>

## 2. The Punishment for Dhimmi

According to Ḥanafī, Shāfi'ī, Ḥanbalī, and Zāhirī jurists if a dhimmi commits adultery with a Muslim or a dhimmi woman, he will be punished according to the punishment of zinā above. While some Ḥanafī jurists rely on the generality of the verse 24:2 which does not specify Muslim or otherwise, the others quoted the incident that the Prophet ordered two Jews to be stoned.<sup>242</sup> It was not certain however whether the Prophet ordered that punishment in accordance with Judaic law or Islamic law. However, the fact that the punishment had been carried out "could imply that the dhimmi is liable to the same punishment as the Muslim."<sup>243</sup> On the other hand, Mālikī jurists held that

the punishment of zinā is not applicable on non-Muslim but the culprit would be referred to his own people to be punished in accordance with their law.<sup>244</sup> Perhaps this view which was expressed by the Mālikī school, who were known as the traditionists, was in order to follow the foot-step of the Prophet in this matter. But Ḥanafī jurists<sup>245</sup> held that the Prophet himself ordered them to be punished. It is further argued that the dhimmī has become inhabitant of dār al-Islām hence all hudūd punishments will be applicable to him except the punishment of liquor.<sup>246</sup> Therefore, he is expected to know that adultery is prohibited. Despite that if he committed the act, he would be punished as a Muslim would in order to wipe out all evils from dār al-Islām.<sup>247</sup> It seems that since the crime committed within the Islamic territory by its inhabitants, it is within the jurisdiction of the Muslim authority to try them. It is inconceivable that the Muslim judge would apply any other law than the law recognized by the court in criminal matters.<sup>248</sup> To do so would be ultra vires for the court and would be deemed unconstitutional. This is the prevailing opinion of the jurists which is in complete harmony with the practise of the Prophet.<sup>249</sup>

### 3. The Punishment for a Musta'min

As has been pointed out earlier the punishment for a musta'min is a matter of disagreement again among the jurists. The key question is whether or not a musta'min, during his short stay in dār al-Islām, liable for all punishments including the offences related to the rights of God. In other words, the jurists differ over his legal status in dār al-Islām. Those who view the musta'min as not being a member of dār al-Islām and hence not abiding by all Islamic law, except in cases pertaining to a man's rights, held that the punishment of zinā is not applicable for him. The leading advocate for this view are of course Abū Ḥanīfah and Muḥammad al-Shaybānī.<sup>250</sup> Mālik and the Ḥanbalī jurists however agree with them if adultery is committed with non-Muslim. But if he committed adultery with a Muslim woman, he should be killed because his amān is void by the act. It appears that the popular (mashhūr) view of Shāfi'ī school is in harmony with Abū Ḥanīfah for it held that musta'min does not abide by the right of God unless there is a clear provision in the agreement to the contrary.<sup>251</sup>

The second view held by Abū Yūsuf and Awzā'ī maintains that all ḥudūd punishments except that for liquor are applicable for musta'min during his stay in dār al-Islām.<sup>252</sup> It is presumed that he is aware that adultery is prohibited by the law of the land. He is



therefore in no position to defend his case, for "ignorance is not a defence". Moreover, the imām can employ his power to prosecute him since he is now under the Muslim jurisdiction, for the hudūd is instituted in order to protect the community at large. To say that he is not to be punished would undermine the whole institutions in the state whereas the amān is granted for the contrary purpose.<sup>253</sup>

It seems that the position of Abū Yūsuf is more acceptable in this issue as in other issues that have been discussed earlier, because adultery is prohibited by all revealed religions; and the Prophet had punished the dhimmī for the same offence. This punishment is obviously applicable for a musta'min since both of them are non-Muslims.<sup>254</sup> It is also contended that Islamic law, in this case, is applicable on all residents regardless of their faith and there should be no discrimination or favouritism to any group of residents, let alone people within its jurisdiction. In addition, to say that a musta'min is not obliged by the right of God is irrelevant, for the right of God is also the right of society as has been suggested by the Ḥanafīs themselves. Therefore the right of the public should not be undermined.<sup>255</sup>

Finally, it is worthy to note that if the Muslim commits adultery with a dhimmī or musta'min there will be no doubt that he will be punished accordingly.

There is no view or evidence which suggests to the contrary.<sup>256</sup>

#### G. Punishment of Rape

Mālik said:

"The position with us about a woman who is found to be pregnant and has no husband and she says, 'I was forced', or she says 'I was married,' is that it is not accepted from her and the hadd is inflicted on her unless she has a clear proof of what she claims about the marriage or that she was forced or she comes bleeding if she was a virgin or she calls out for help so that someone comes to her and she is in that state or what resembles it of the situation in which the violation occurred." He said, "If she does not produce any of those, the hadd is inflicted on her and what she claims of that is not accepted from her."

Mālik said, "A raped woman cannot marry until she has restored herself by three menstrual period."

He said, "If she doubts her periods, she does not marry until she has freed herself of that doubt."<sup>257</sup>

With regards the punishment for rapist according to Ibn Qayyim what he found from the view of Aḥmad b. Hanbal was that if a dhimmī commits a zinā with Muslim woman, he will be killed because he had breached the contract and the hadd is inflicted on the woman. But if she was forced then no hadd is carried out on her.<sup>258</sup> When Aḥmad b. Hanbal was asked what to do with a dhimmī who has committed adultery with a Muslim woman, he replied the man was to be killed. When he was asked about the evidence, in terms of legal ruling or precedence, or the like, he replied it was reported

that 'Umar I used to order the man to be killed for the same offence.<sup>259</sup> It appears that this is also the view of the Shāfi'ī school except that Shāfi'ī holds that such a provision should be clearly stated in the agreement.<sup>260</sup> On the other hand, Abū Ḥanīfah holds that commission of the crime does not affect the contract. But the culprit is still liable for ḥadd punishment with its varying degree depending on his marital status.<sup>261</sup> According to Ibn Qudāmah when the contract is deemed void, the imām is empowered to punish the criminal ranging from killing him to setting him free, for his status is now just like the ḥarbī.<sup>262</sup>

It seems that since the act of force (ikrāh) per se is a crime, the proper punishment for a rapist is a ḥadd of zinā together with ta'zīr punishment for using the force against one's free will. This conclusion is reached in view of the fact that most jurists, with a few exceptions, were not concerned, according to our investigation, discussing the punishment of the rapist but they were rather interested in whether the victim should be punished or not.<sup>263</sup> This is perhaps, because in the past, raping as a crime hardly occurred or if there was a case, the punishment of adultery was probably deemed sufficient to deal with it.



## H. The Punishment for Homosexuality and Similar Cases

According to Ibn Qudāmah all scholars agreed that homosexuality (al-liwāt) is forbidden (ḥarām) in Islam. The practise of it would be liable for condemnation from God and his Apostle.<sup>264</sup> It is an abnormal behaviour but the act by no means a new phenomenon in human history. It is therefore a manifestation of moral decadence in a permissive society. According to the Qur'ān:

And Lot! (Remember) when he said unto his people: "Will you commit abominations such as none in all the world has ever done before you? Verily, with lust you approach men instead of women: nay, but you are people given to excesses!"

And the answer of his people was only that they said (one to another): Turn them out of your township. They are folk, forsooth, who keep pure.

And We rained a rain upon them. See now the nature of the consequence for evil-doers!<sup>265</sup>

There are three opinions regarding the punishment of homosexuality. According to Mālik, Ḥanafī jurists, Aḥmad b. Ḥanbal and a popular view of Shāfi'ī both of the culprits should be killed whether they are married or not married. This view was reported from Abū Bakr, 'Umar I, Ibn 'Abbās, 'Alī and others. Hence, the punishment has become a consensus of the Companions.<sup>266</sup>

Another view was reported from Shāfi'ī and another opinion of Ḥanbalī schools that the punishment of homosexuality is identical to the punishment of zinā.

This opinion is attributed to some followers of the Companions such as 'Aṭā, Nakha'ī, Sa'īd Ibn al-Musayyab and others.<sup>267</sup> On the other hand, Abū Ḥanīfah and the Ṣāḥirī school maintain that the act is not liable for ḥadd but ta'zīr punishment; for to them the act is not constitute a zinā proper.<sup>268</sup>

As for the punishment of lesbians (siḥāq), it was agreed that the act is forbidden. The Prophet was reported to have said: "If a woman commits an act of sexual relationship with another woman they are adulterers".<sup>269</sup> Despite the fact that the act is considered as immoral, the jurists agree that there is no ḥadd for it. But the act is considered zinā which has no ḥadd because there is no element of penetration as a basic requirement for zinā. However the jurists agree that both of them would be subjected to ta'zīr punishment.<sup>270</sup>

If anyone, man or woman, was found to be engaged in sexual intercourse with animal, the majority of jurists<sup>271</sup> agreed that there is no ḥadd for the act but ta'zīr. As for the animal, whether it is edible or not, it is to be killed.<sup>272</sup>

With regards the punishment of dhimmī who engaged in the act of homosexuality it should be first determined the nature of the punishment applicable to this offence. Abū Ḥanīfah and the Ṣāḥirī jurists held that the punishment of ta'zīr is applicable since the

offences do not meet the requirements of zinā.<sup>273</sup> On the contrary, Shāfi'ī and the Ḥanbalī jurists maintain that the act is zinā hence its punishment is applicable to the offenders.<sup>274</sup> It follows that when it is so decided, the views of jurists on the punishment of dhimmī in relation to zinā is adopted as has been discussed above.<sup>275</sup> As to the position of musta'min in this regard, it could also be referred to the jurists' views in the previous discussion. It seems that this later view is more relevant because of the nature of the offences and the degrees of its obscenity, abomination and repugnance to the Islamic values which have always been upheld by the state.<sup>276</sup> As for those who engaged in sexual intercourse with animal and lesbianism, the punishment for them is ta'zīr with its varying degrees depending on the merit of the offenders. It should be recalled that according to the jurists ta'zīr is applicable to both Muslims and non-Muslims.<sup>277</sup>

Finally, it can be concluded that the Islamic treatment of the offence of zinā and its similar cases appears to be rather unusual. This is because the Islamic law is based entirely on morality. Any moral transgression is seriously condemned by means of severe punishments. Its philosophy and world-view are not identical to that of the Western society. It follows that the concept of personal freedom, hence



sexual freedom, is entirely opposed to that of the post-war generation in the West. Personal freedom according to the Islamic concept is permissible only in matters not regulated by the injunctions and prohibition laid down in the Qur'ān and the Sunnah. By contrast, the imposition of such limitation by the supreme authority is completely absent from the contemporary Western image of the relationship between law, society, and the individual. This different sense of the source of authority may, perhaps, explain many of the differences between the Islamic and Western legal systems.<sup>278</sup> It follows that the whole concept of punishment, as a result, would naturally be different to that of the Western concept. Any attempt to compare the two systems using the balance sheet of one at the expense of the other would eventually cause more harm than serve the interest of the both systems. This approach, it seems, has led Schacht, to his conclusion while discussing the Islamic law of punishment that there exists no general concept of penal law in Islam.<sup>279</sup>

#### I. False Accusation of Unchastity (al-Qadhf)

It is an unproved allegation that someone has committed a zina.<sup>280</sup> This is forbidden by a clear injunction from the Qur'ān. Its punishment, if the accuser is unable to produce witnesses, is eighty

lashes. Hence, the punishment is in some way a reparation for the ignominy suffered by the accused.

The Qur'ān says:

And as for those who accuse chaste women (of adultery), and then are unable to produce four witnesses (in support of their accusation), flog them with eighty stripes; and ever after refuse to accept from them any testimony- since it is they, they that are truly depraved! excepting (from this interdict) only those who afterwards repent and made amends: for, behold, God is much-forgiving, a dispenser of grace.<sup>281</sup>

According to the exegetes, although the text above clearly speaks about chaste women it is also should be construed as to include men as well. This is the consensus of the jurists.<sup>282</sup> The view that the future testimony of the accuser will not be accepted unless he has repented was held by all the jurists except Abū Ḥanīfah who insisted that the accuser's testimony will not be accepted forever even after he has repented. However, if he repented before the punishment, his testimony will be accepted.<sup>283</sup>

The Qur'ān stipulates that the accused, man or woman, should be muḥṣan. In this context, unlike in the case of zinā, iḥṣān means chaste.<sup>284</sup> Another condition put by the jurists are that the accused must be a sane adult Muslim who is known to be a chaste person.<sup>285</sup> On the other hand, the Zāhirī jurists held that Islam is not a condition for iḥṣān. He maintains that the Qur'ān only stipulates iḥṣan as a condition.

Hence, with that generality expressed by the Qur'ān, it should include Muslim and non-Muslim women alike.<sup>286</sup> But the majority rely on the following verse: "Lo! as for those who (falsely, and without repentance) accuse chaste, unmindful believing women ....<sup>287</sup> The verse clearly stipulates that Islam is a condition for iḥṣān. It was also reported that the Prophet said: "whoever associates (anything) with God he is not muḥṣan."<sup>288</sup>

It should be noted here that the terms of accusation should be understood as nothing less than zinā in order to be liable for ḥadd. The expression used for slandering and defamation which is not clearly or expressly associated with zinā<sup>289</sup> does not fall under ḥadd al-qadhf but would make the accuser liable for ta'zīr punishment which will be decided by the authority.<sup>290</sup>

To sum up, it can be concluded that there are two qadhf in Islamic law namely, a false accusation of zinā to a chaste person (muḥṣan) which would be liable for ḥadd or the process of negation of the child as between husband-wife relationship (al-li'ān);<sup>291</sup> another qadhf is a mere accusation which does not amount to zinā including using abusive or insinulative expression which would make the accuser liable to ta'zīr punishment.<sup>292</sup>



### 1. The Punishment for Dhimmī

If a dhimmī accuses a Muslim man or woman provided that all the conditions set above are met, he would be liable for ḥadd, for Islam was not a condition for the eligibility of the punishment. This is the opinion of the majority schools of law.<sup>293</sup> On the other hand, the Zāhirī jurists say that the man should be killed for the violation of his contract unless he becomes a Muslim in which case he would be liable for ḥadd.<sup>294</sup>

If a dhimmī accuses another dhimmī or musta'min the majority says that there will be no ḥadd for him because they held that one of the conditions of ḥadd al-qadhf was that the accused must be a muḥṣan. It is agreed that Islam is a condition for iḥṣān in the view of the majority.<sup>295</sup> But the Zāhirīs held that he would still be liable for ḥadd since, to them, Islam was neither a condition for the accused nor the accuser.<sup>296</sup> According to Sa'īd b. al-Musayyab and Ibn Abī Laylā in the case of the accused being a dhimmī woman who has a Muslim child, the accuser should receive with the ḥadd.<sup>297</sup> This, perhaps, is because they considered him as accusing a Muslim. On the other hand, when he was asked, Mālik held that the man should be inflicted with exemplary punishment. For he considered the act as undermining the husband and her children who are Muslims.<sup>298</sup> In addition, the majority held that though the dhimmī is not to be punished for

accusing non-Muslims, he would still be liable for ta'zīr.<sup>299</sup> The same punishment would be inflicted on the dhimmī in case of making accusation against a Muslim or a non-Muslim which did not amount to zinā.<sup>300</sup>

## 2. Effect on Dhimmī's Testimony.

Generally speaking, the punishment of the false accusation would effect, as a result, the future testimony of the accuser. According to the Ḥanafī school, who accepts dhimmī's testimony for a dhimmī or musta'min,<sup>301</sup> if the dhimmī had been punished, his future testimony will be rejected.<sup>302</sup> However, if he becomes a Muslim his testimony will no longer be rejected. Consequently, he can testify for Muslims and non-Muslims as well, for the capacity to testimony is achieved by becoming a Muslim. Therefore, it is not to be rejected.<sup>303</sup> Furthermore, it should be recalled that the Qur'ān stipulates the rejection at the time of making accusation. Therefore, this newly gained capacity should not exclude him from his future testimony.<sup>304</sup> This is because according to Islamic point of view conversion obliterates anything before it."<sup>305</sup>

As for the position of musta'min, in the case of qadhf, it appears that his position is the same like a dhimmī's in liability to the punishment. In other

words, if he accuses a Muslim, man or woman, he will be punished. This is the opinion of all schools including Ḥanafī and Awzā'ī. For according to the jurists since this offence involves the right of human beings, the musta'min should be held responsible for it.<sup>306</sup> However, if he accuses non-Muslims there will be no ḥadd on him except in the opinion of the Ṣāḥirī jurists as already discussed. The same rule is applicable with regard to his future testimony after the punishment.

### 3. The Punishment for a Muslim Who Accused a non-Muslim

As has been discussed above one of the conditions of ḥadd al-qadhf is that the accused must be a muḥṣan. One of the requirements of iḥṣan however is Islam. This is the view of the majority with the exception of the Ṣāḥirī jurists. Hence, according to the majority if a Muslim accuses a non-Muslim he is not subject to the ḥadd punishment but would be liable for ta'zīr.<sup>307</sup> This is the only criminal cases that the Muslim, in so far as this investigation is concerned, is not liable for the ḥadd punishment with regards to his relation with non-Muslims. Nevertheless, as stated above, according to Ibn al-Musayyab and Ibn Abī Laylā if a Muslim accuses a dhimmī woman who has a Muslim child, he will be punished.<sup>308</sup>



If a Muslim accuses a dhimmī or musta'min with an expression not explicitly understood as zinā, the Muslim will be liable for ta'zīr.<sup>309</sup> For that kind of vituperation has no specific punishment in the texts. But neither the Muslim nor the non-Muslim can vilify one another; this is in order to promote and maintain good relationship between the two communities.

Finally, in Saudi Arabia, which follows Ḥanbalī school, the Islamic law of qadhf is still in operation. It punishes the accuser, Muslim and non-Muslims alike if the conditions of the punishment are met. So does the law of li'ān between a non-Muslim couple because Islam is not a condition of being a husband and wife according to Ḥanbalī school. The punishment of ta'zīr is also applicable for the offences relating to slandering or the like.<sup>310</sup>

#### J. The Crime of Theft (al-Sariqah)

Theft is defined as "taking someone else's property by stealth."<sup>311</sup> This definition is acceptable by almost all jurists. The crime falls under the hudūd. Its punishment is the amputation of the hand as the Qur'ān commands: "As for the thief, both male and female, cut off their hands. It is the reward of their own deeds, an exemplary punishment from God. God is Mighty, Wise."<sup>312</sup> As the text unequivocally speaks to that effect, the punishment of the theft is agreed

among the scholars.<sup>313</sup> The central element of this crime, however, should be established namely, the act is committed in a quite or secret manner as to avoid being detected otherwise it would fall under another category of offences.<sup>314</sup> Therefore, the element of stealing should be proved in order to prosecute the thief.

#### 1. Some Disputed Points on the Punishment

The jurists are not in agreement over the value of the stolen property (niṣāb al-sariqah). They differ on the determination of the minimum amount. According to the Ḥanafī school the punishment for theft cannot be inflicted unless the value of the stolen property is not less than ten dirhams or one dinār.<sup>315</sup> Whereas Nakha'ī says that it must be forty dirhams; Ibn Abī Laylā says that it should be five dirhams.<sup>316</sup> Mālikī, Shāfi'ī<sup>317</sup> and Ḥanbalī schools hold that the amount must be three dirhams or a quarter of a dinār or above.<sup>318</sup> The Ṣāhirī jurists maintain that there is no fixed minimum amount required for the punishment. This opinion was shared by Ḥasan al-Baṣrī who expressed the same view. Hence, for them the ḥadd can be carried out for any amount of stolen property because the Qur'ān does not suggest to the contrary.<sup>319</sup>

Thus, the majority of Muslim jurists, consisting of three schools, agreed at the fixed minimum value of

three dirhams of the stolen property for the liability of hadd punishment.<sup>320</sup> They rely on the Tradition which was reported from 'Ā'ishah that the Prophet has said: "The hand is amputated for a quarter of a dinār and above."<sup>321</sup> This punishment was carried out several times in the time of the Prophet and it was reported that he prohibited any mediation in the executing of the hadd.<sup>322</sup>

The attempts by the jurists to determine the minimum value of the stolen property is vital in view of the severity of the punishment. For hudūd could not be carried out if there exists some elements of uncertainty about the fact of the case.<sup>323</sup> If, at any case, the value of the stolen property is worth less than the said amount, there will be no hadd for the culprit but he may nevertheless be liable for ta'zīr punishment.<sup>324</sup>

It should be borne in mind that the jurists' discussion pertaining to the fixed minimum value of the stolen property, hence its liability for hadd punishment, is no longer relevant to the present situation. This is simply because the value of money and the cost of commodities has changed now and varies from place to place. But it may, however, serves as a guideline for today's lawmakers in each Muslim country to decide, as they see fit and proper, the minimum value, in the light of the present cost of



living, to be liable for the hadd punishment.<sup>325</sup> Due consideration should be given to the minimum value set by the Prophet and compare it with our time.

Moreover, the jurists also disputed over how the hand of the convicted should be cut off and whether the stolen property should be kept in a proper place (al-hirz). However, these two points are beyond the scope of this investigation.

On the other hand, it should be recalled that among the inalienable rights of every member of the Islamic society, Muslim and non-Muslim alike, is the right to protection by the community as a whole. Everyone is entitled to a share in the community's economic resources, for, Islam envisages and demands a society that provides not only for the spiritual needs of man, but for his bodily and intellectual needs as well. But if the available resources of a community are so unevenly distributed that certain groups within it live in affluence while the majority of the people are forced to use up all their energies in search of their daily bread, poverty becomes the most dangerous enemy of spiritual progress, and occasionally drives the whole communities away from consciousness of God into the arms of soul-destroying materialism. If the society is unable to fulfil its duties, it has no right to invoke the full sanction of criminal law (hadd) against the individual transgressor, but must

confine itself to milder forms of administrative punishment (ta'zīr. It was in correct appreciation of this principle that the Caliph 'Umar I waived the ḥadd of hand-cutting in a period of famine which afflicted Arabia during his reign.<sup>326</sup>

## 2. The Punishment of Dhimmī for Theft

Jurists of different schools agreed that Islam is not a condition for the liability of the punishment of theft. Hence, Muslim or non-Muslim, if convicted, is liable for the cutting-off of a hand because of the generality of the text.<sup>327</sup>

If a dhimmī steals from a dhimmī or Muslim, provided that all the conditions of the ḥadd are met, the punishment is inflicted on him. There is no disagreement over this issue among the jurists.<sup>328</sup> For the dhimmī, as previously pointed out, by virtue of the contract, is obliged to follow the law of the land.<sup>329</sup> However, the jurists split over the question of whether the dhimmī could be held responsible if he steals from a musta'min. According to the Mālikī and Ḥanbalī schools he is liable for punishment. The Ḥanbalī jurists say that since the Muslim is held responsible for stealing the property of musta'min which is in the state of inviolability, so, by analogy, the dhimmī is also would be held responsible, for, the dhimmī is treated, in this respect, equally

before the law.<sup>330</sup> As for Shāfi'ī jurists they contend that there should be no ḥadd on dhimmī as well as no ḥadd on musta'min if he steals from a Muslim or dhimmī.<sup>331</sup> Ḥanafī jurists, however, except Zufar, maintain that no ḥadd would be inflicted on a thief of a property of musta'min because his property is considered as semi-permissible as also the case of his blood. It is for this reason that if he is killed there will be no qisās against the killer. For, the enjoyment of amān is temporary and does not, by any means, change his status as ḥarbī from the legal point of view.<sup>332</sup>

It seems that the view of the Mālikī, Ḥanbalī, and Zufar, a Ḥanafī jurist, is more relevant in this case, for, by virtue of amān, even temporary, the protection must be all-inclusive including his property. To say the contrary would not only undermine the concept of amān itself but also it would ruin the credibility of the Islamic state.<sup>333</sup>

On the other hand, the majority of jurists agreed that there is no ḥadd on the one who steals pigs and liquor. This is true whether the thief is a Muslim or dhimmī and whether the property belongs to a Muslim or dhimmī. The rationale for this is that among the conditions of ḥadd the stolen property must be a considerable value. Since both commodities are valueless, from the Muslim legal point of view, there



will be no ḥadd on the thief.<sup>334</sup> Nevertheless, he may face ta'zīr punishment, as in any offence. By contrast, according to the Zaydī school the thief should be punished if he steals them from a dhimmī or musta'min. This is because pigs and liquor are commodities that can be possessed and valuable for non-Muslims<sup>335</sup>

It should be noted that for any offence against the property other than theft and hirābah, the offender will be punished under ta'zīr rather than ḥadd punishment whether he is a Muslim or non-Muslim, dhimmī or musta'min.<sup>336</sup>

As for musta'min if he is involved in stealing and convicted the position of jurists are divided in two groups, as in previous cases concerning the liability of musta'min. The Ḥanafī jurists and some Shāfi'ī jurists held that he is not liable for punishment. This is because the punishment for theft is related to the rights of God which are more obvious than man's rights which in no case could a musta'min be held responsible for.<sup>337</sup> Conversely, Ibn Abī Laylā, Abū Yūsuf, Awzā'ī, Mālikī and Ḥanbalī jurists held that the musta'min is liable for ḥadd. They maintain that the musta'min is obliged to obey the law during his stay in dār al-Islām. His position is like that of dhimmī in this respect. Further, theft is a crime by its definition and should be punished to deter the

others and protect property.<sup>338</sup> Ibn Qudāmah added that if an apostate steals and found guilty he will be punished accordingly because Islamic law is applicable to him.<sup>339</sup>

It seems that the majority view is preferable in this case simply because the law is applicable to all people and the jurisdiction or rather authority of dār al-Islām is over all its inhabitants. It is inconceivable to let the musta'min commit a crime of theft without punishment and the amān is granted on the condition that he shall stay in a good conduct and not break the law. It should be recalled that the right of God is also the right of society as has been claimed by the Ḥanafī jurists themselves.<sup>340</sup>

On the other hand, if a musta'min steals liquor or pigs, he will not be punished as in the case of dhimmī. This is the view of the majority of jurists including the Ḥanafī jurists except for the view of the Zaydī school as has been pointed out above.<sup>341</sup>

### 3. The Punishment of Muslim Who Steals from non-Muslim

There is no doubt that if a Muslim is found guilty of stealing from a dhimmī he will be punished accordingly. For the property of dhimmī is treated as the property of a Muslim.<sup>342</sup> There is no differences of opinions among the jurists about that except when he steals a pig or liquor from a dhimmī. Then the

majority held that he will not be punished, for, those commodities are treated as valueless from the Muslim legal point of view.<sup>343</sup> Some jurists however held that the Muslim should pay compensation while others say the contrary.<sup>344</sup> The Zaydī school held that the Muslim thief should be punished if he steals from a dhimmī within the locality of dhimmī's residence. This difference of opinions also arises in case of a Muslim stealing both commodities from a musta'min.<sup>345</sup> It has been suggested that the view of Zaydī school is more acceptable because both commodities are considered valuable for non-Muslims. This is also the view of 'Aṭā who says that whoever steals a liquor from 'People of the Book' the ḥadd is inflicted on him.<sup>346</sup> To say to the contrary would be enhance disorder and crime in society.

On the other hand, the jurists are also split whether the Muslim should be punished if he steals the property of a musta'min. According to Shāfi'ī jurists the Muslim will not be punished because the musta'min is also not liable for punishment if he steals from a Muslim or dhimmī.<sup>347</sup> The Ḥanafī jurists are split over the issue,<sup>348</sup> whereas the Ḥanbalī school says that the man must be punished because the property of the musta'min is in the state of inviolability.<sup>349</sup> This latter opinion is preferable, for, the property of the musta'min is under the protection of a state as has



stated above.<sup>350</sup>

Finally, this law of hadd punishment pertaining to theft is still in action in Saudi Arabia. The punishment is applicable, if convicted, to both Muslim and non-Muslim whether he is a citizen or non-citizen. As for other offences of property, other than theft and hirābah, the punishment of ta'zīr is applicable depending on the ijtihād of a qāḍī.<sup>351</sup>

## II. Family laws<sup>1</sup>

Perhaps one of the most greatly discussed subjects, in Islamic law, treated by divine texts and later, developed by the jurists of different schools, is the law pertaining to marriage and its related subjects (munākahāt). It is the only survival area of Islamic law with some exceptions, which still dominates the daily life of the Muslims throughout the Muslim countries. For the vital role of a family as a basic structure of Muslim society, at least in its ritual and legal forms, is still well-maintained even by the most nominal and corrupt Muslims. It is for this reason, perhaps, that the Islamic family law, apart from ʿibādāt (acts of worship), occupies much attention from the jurists hence, it becomes a positive law and has more opportunity to develop within its own operational areas.

### A. Marriage to Non-Muslims

We have stated in the previous chapter that a Muslim is allowed to marry non-Muslim woman of kitābiyyāt? This is the majority opinion of the Muslim jurists of different schools except a view alleged to be attributed to Ibn ʿUmar.<sup>3</sup> On the other hand, non-Muslims are not allowed to marry Muslim women.<sup>4</sup> This prohibition is a clear injunction from the Qur'ān.<sup>5</sup> If there is a case of such marriage,

however, the jurists say that the couple must be separated and there will be no legal effect to both parties whether before or after consummation as the marriage was legally invalid in the first place.<sup>6</sup> As for the Muslim, he may marry a Christian or Jew woman, dhimmī or non-dhimmī but not to marry any woman other than kitābiyyāt. This is the position of the most Personal Law Statutes in the contemporary Muslim countries including Saudi Arabia.<sup>7</sup>

#### B. Marriage Among non-Muslims

With regard to the marriage of non-Muslims to each other, whether among the same or different religions, the Islamic family laws has left complete legal freedom provided that no Muslim is involved or they do not take the case to the Muslim court. Such a legal autonomy with its jurisdiction,<sup>8</sup> in addition to religious and social, as will be seen, is based on these principles:<sup>9</sup>

1. Any valid and lawful marriage as between Muslims is likewise valid and lawful among non-Muslims. For it is held that since non-Muslims believe that their marriage is lawful, the Muslims would therefore take it as valid as well.<sup>10</sup> This principle was "based on the Tradition which says that: "I was sent to the red and the black (all races)." <sup>11</sup> It is also contended that in the Qur'ān God mentions clearly



about Abū Lahab with his wife and Pharaoh with wife to suggest that they were recognised as husbands and wives and were legally married according to their beliefs.<sup>12</sup> Moreover, there was no report that the Prophet ordered his Companions to be re-married after they became Muslims. As for those who had more than four wives, the Prophet just ordered them to reduce them to four, the same case would apply as between two sisters married to one man.<sup>13</sup>

2. Any invalid marriage between Muslims, for lack of its necessary requirements, would be deemed valid among non-Muslims if they so believe. This is the views of Shāfi'ī and Ḥanbalī jurists.<sup>14</sup> For instance, if non-Muslims perform a contract of marriage without witnesses, such a marriage is perfectly valid for non-Muslims but not in the case of Muslims.<sup>15</sup> Ḥanafī jurists, however, are split over this issue. According to Abū Ḥanīfah and his friends this marriage is valid even after the couple become Muslims. On the other hand, Zufar says that the marriage is left intact except when the couple come to a Muslim judge or become Muslims, then the judge should separate them.<sup>16</sup> For according to the Qur'ān: "So judge between them that which God hath revealed, and follow not their desires."<sup>17</sup> This tolerant attitude is taken in view of the fact that they are "people of the pact". For by concluding the contract of (dhimmah) they become part

of dār al-Islām hence, obliged to observe Islamic law on matter of muʿāmalāt. However, no action should be taken against them in order to honour the pact.<sup>18</sup> On the other hand, Abū Ḥanīfah held that witnessing the contract of marriage is the right of God where non-Muslims are not required to fulfil it. It is also alleged that some Muslim jurists such as Ibn Abī Laylā say that the marriage is valid without witnesses.<sup>19</sup> Further it was agreed that the Muslims were ordered not to interfere with the belief of non-Muslims, to leave to them (non-Muslims) whatever they believe except in some cases like zinā and ribā.<sup>20</sup> The case of wine and pigs is a clear example of that attitude of non-interference. Therefore if non-Muslims believe that marriage without witnesses is valid then it is lawful for them. That validity is true and uninterrupted even after the couple take the case to Muslim judge or become Muslim. For the necessity of witnesses is a condition for initiation not for continuation.<sup>21</sup>

Another form of invalid marriage among the Muslims but not so as among non-Muslims is a marriage of a non-Muslim to a divorcee during her waiting period. Abū Ḥanīfah says this marriage is valid if they so believe but his colleagues, as well as Zufar and Shāfiʿī, hold to the contrary.<sup>22</sup> For, it was agreed that marriage during waiting period is null and void

for the Muslims and non-Muslims alike. But the Muslim authority will not interfere since the couple enjoys the immunity of ‘aqq al-dhimmah unless they come to the Muslim judge or become Muslims thereafter, they will be separated in accordance with the Islamic law.<sup>23</sup> As for the position of Abū Ḥanīfah it was contended that the waiting period was not required for a dhimmī as it was required for a Muslim. For its requirement is either for the right of God or her former husband. As for God the dhimmī is not obliged to it. The same applies to the right of the former husband since he does not believe in it. Since there is no waiting period, therefore the marriage is valid and lawful for dhimmī even after they take the case to the Muslim judge or become Muslims.<sup>24</sup>

3. Any prohibited marriage for Muslims, as between mahārim (plural of mahram)<sup>25</sup> such as mother, daughter, sister and the like, is allowable for non-Muslims hence eligible for maintenance. This is the opinion of Abū Ḥanīfah but his colleagues hold to the contrary except that the Muslim judge, even if he knows the fact, will not separate them unless the couple came to the Muslim court or became Muslims, thus the Islamic law would be applicable. This is because of the existence of the dhimmah contract.<sup>26</sup> It is clear therefore, that in the realm of personal laws non-Muslims enjoy almost absolute autonomy from the



interference of the Muslim authority. It follows that any dispute among them emanating from these relationships, can be settled in their own court. The court however, is fully competent to try and deliver a judgement in accordance with their laws or beliefs. But if one of the parties involved is a Muslim or they take the case to the Muslim court, the case will be decided in accordance with the Islamic law.<sup>27</sup> This is precisely what the Cairo Primary Court of Family Laws decided in its decision involving inter-marriage of different sects.<sup>28</sup> The court refused to declare the nullification of the marriage between a Catholic woman and an Orthodox man. The wife took the case to the court and argued that according to the Family Laws of Coptic Catholic the marriage between the Catholic and non-Catholic is invalid. But the court in its judgement held that its law which applied in these cases, where the two parties were of different sects, is the Islamic law which regarded that the marriage is perfectly valid because all the conditions concerning the contract are fulfilled.<sup>29</sup> This case illustrates clearly the position of Islamic law which sees no impediment to the marriage of different religions, even though it is deemed invalid in accordance with non-Muslim laws, provided that the contract meets the conditions of marriage in Islam. This position is in line with the views of the jurists. According to

Kāsānī: "the marriage among dhimmī is allowable even from different religions, for non-Muslim are considered as one religion."<sup>30</sup> The same opinion is expressed by Sarakhsī when he writes: "The marriage among the (dhimmīs) such as between a Jew and Christian is allowable. For it is like the marriage of Muslim from different schools of laws."<sup>31</sup>

Finally, the marriage of non-Muslims, in contemporary Muslim countries like Egypt, is being concluded in accordance with the relevant family laws of each respective religion. However, in any dispute arising from two parties of different religions or sects, the Islamic law of the Ḥanafī school is applicable.<sup>32</sup> The provisions pertaining to witnesses, waiting period, non-marriageable persons etc. are observed among non-Muslims. We can say therefore that most conditions of valid marriage of non-Muslims are in agreement with that of Muslim.<sup>33</sup>

### C. The Effect of Conversion on non-Muslims Marriage

#### 1. In Dār al-Islām

If both husband and wife, who are legally and validly married, become Muslims, the bond of marriage continues and there is no reverse effect whatsoever to their connubial relationship. But if the wife, in the first place, happens to be a non-marriageable person, by birth or suckling, all scholars say that they have to

be separated.<sup>34</sup> This ruling is taken in view of the fact that in the time of the Prophet the conversion took place en bloc. The Prophet acknowledged their marriages without asking as to how and when they got married.<sup>35</sup> This fact has become common knowledge and acceptable to all.

In the case of only the husband becoming a Muslim, he may retain his kitābī wife but not a non-kitābī one such as the Magian, idolater, or the like. If he married more than four wives prior to becoming Muslim, he can only retain four of them. This is what the Prophet ordered Qays bin al-Ḥārith and Ghaylān b. Salamah who had eight and ten wives respectively.<sup>36</sup> The same case would apply to a man who had married two sisters.<sup>37</sup> If a man married a woman and her daughter concurrently and both of them become Muslims together with him before consummation took place with either one of them, the mother should be separated. This is because the mother would be automatically non-marriageable by virtue of the contract of her daughter to the man. But the daughter will not be prohibited prior to the consummation of her mother. If the consummation took place with both of them, they would be separated. For one has become the mother of his wife and the other was the daughter of his wife. This is the view of all jurists.<sup>38</sup>

On the other hand, if the wife alone becomes



Muslim, or the wife is of non-kitābī while her husband has become Muslim, the opinions of the schools are as follows:

a. Mālikī School

According to Mālikī jurists if the conversion of the wife took place before consummation, they should be separated immediately. If it took place after consummation, their marriage depends on the conversion of the husband during her waiting period. If he becomes Muslim within that period of time, their marriage continues unaffected otherwise they will be separated.<sup>39</sup> Thereafter the offer of Islam to the husband is no longer required.<sup>40</sup>

Moreover, if a man married to a non-kitābī woman has converted, but his wife refused to do so the separation should take place immediately after her refusal.<sup>41</sup> Needless to say that this case is only involved the couple after consummation.

According to Ibn Shubrumah (d. 144/761), a Kufī jurist,<sup>42</sup> the separation should take place at the end of the waiting period. He contends that in the time of the Prophet, the conversion took place in many forms depending on individual's situation. At times, a husband took a lead and in many cases the wives converted before their husbands as in the case of 'Ātikah bt. al-Walīd b. al-Mughīrah, a wife of Safwān b. Umayyah and Umm Ḥakīm bt. al-Ḥārith b. Hishām, a

wife of 'Ikrimah b. Abī Jahl.<sup>43</sup> Therefore whoever convert before the end of the waiting period, their marriage continues otherwise the bond is to be cut-off.<sup>44</sup> Ibn Shihāb says that the duration between the conversion of Safwān and his wife was about a month.<sup>45</sup>

b. Hanafi School

As for Hanafi jurists they say that there should be an offer to Islam to the party who had not become Muslim, if he or she accepts Islam, the bond of marriage continues uninterrupted.<sup>46</sup> If that party reluctant to become a Muslim or changes to another religion, they would be separated. In case the husband, who is not a Muslim at the time of his wife conversion, is a minor, they should wait until he attains the age of puberty or he has a sound judgement. If he is insane, the offer of Islam should be directed to his parents.<sup>47</sup> For if any one of them accepts Islam it would be sufficient for him (husband) to be included under the rule of dependant. If the parents refused to become Muslims, the judge will separate them. If the insane has no parents the guardian should be appointed for him to arrange the separation.<sup>48</sup>

c. Shāfi'i and Hanbali Schools.

According to Shāfi'i and one view held by Hanbali

jurists if the conversion takes place from either one of the couple before consummation<sup>49</sup> the marriage is voidable. If it occurs after the consummation, the conversion of the other party before the end of the waiting period will save their marriage if the wife was of marriageable to him at the first place. If he remains in his former religion they will be separated at the end of her waiting period.<sup>50</sup> Another opinion reported from Aḥmad b. Ḥanbal was that they should be separated immediately without waiting for the end of the period.<sup>51</sup> It is noted that the starting point of the waiting period takes effect from the conversion not the time of separation<sup>52</sup>.

d. Zāhirī School.

The literalist jurists such as Ibn Ḥazm (d. 456/1065) contends that as soon as the conversion takes place the marriage is voidable by itself though the other party follows the suit. Consequently, they should have a new contract to be eligible for each other. Ibn Ḥazm says that this is the opinion of Salafī jurists such as Qatādah, Shaʿbī and others. It is also the view of the two ʿUmars and other Companions such as Ibn ʿAbbas and others.<sup>53</sup> It was reported that ʿUmar I separated a Christian couple as soon as the wife became Muslim.<sup>54</sup>



e. THE View of Ibn Qayyim.

According to Ibn Qayyim if either of the couple becomes Muslim what can be construed from the ruling of the Prophet is that the marriage is to be suspended (mawqūf); it is not immediately null and void. This means that if the husband becomes a Muslim before the end of the waiting period, the marriage continues unaffected. This also means that by the expiry of waiting period, she is free to marry to another man or wait her former husband. If he joins her, then he is her husband without the need of having a new contract. In short, there are two alternatives for this case, i.e. total separation or waiting for his or her spouse for unspecified time.<sup>55</sup>

As for immediate separation or waiting for the expiry of waiting period, Ibn Qayyim says that in the wake of so many people embracing Islam with their wives, sooner or later, we have no knowledge that the Prophet has ruled in accordance with either <sup>one of</sup> these.<sup>56</sup> There was no evidence that the Prophet has renewed their contracts despite the fact that their conversion did not take place concurrently. It was reported that the Prophet returned his daughter Zaynab to her husband Abī al-‘Ās b. al-Rabī‘ who embraced Islam after the treaty of Ḥudaybiyyah whereas Zaynab became Muslim in early Islam.<sup>57</sup> This is also true for the conversion of Companions and their wives including Abū

Sufyān.<sup>58</sup>

Finally, Ibn Qayyim says that had it not been for the confirmation of the Prophet over their former contract, though their conversion occurred one after the other, some after the Ḥudaybiyyah, some after the conquering of Mecca and some after the revelation of Mumtaḥinah verses,<sup>59</sup> we would say the immediate separation for reason of Islam without regarding the waiting period because the Qur'ān says: "They are not lawful (wives) for the unbelievers, nor are the unbelievers lawful (husbands) for them...But hold not to the guardianship of unbelieving women."<sup>60</sup>

We can conclude from this opinion that the waiting period is a good basis for termination of marriage. Henceforth the choice is open to the wife either to have a new marriage or to wait for her former husband. If he embraces, Islam the bond of marriage continues even after the lapse of waiting period. But this view lacks the practical solution for the wife having a new marriage with respect to her waiting period. For it says that the wife could have a new marriage after the expiry of waiting period, if her former husband does not join her. This means that the end of waiting period is a cause for termination or separation. This is against the established rule in Sharī'ah which purported that the starting point of waiting period is after separation not otherwise.<sup>61</sup>

## 2. Difference of Domicile (Ikhtilāf al-Dār)

In legal sense, the difference of domicile means that one of the spouses lives in dār al-Islām, whether as dhimmī or amān status, then he unilaterally converts to Islam. But his wife, who is in dār al-ḥarb remains in her former religion. The other sense of the term is that one of the couple who are the citizens of dār al-ḥarb becomes a Muslim, and hence migrated to dār al-Islām leaving his wife behind in dār al-ḥarb.<sup>62</sup> In short, the difference of domicile followed by the difference of religion between the couple who were legally married creates a legal issue among the jurists with regard to their future connubial relationship. There are two major views over the issue. The majority says that the difference of domicile per se would not entail separation except for no conversion by the other spouse with the expiry of the waiting period. This is the opinion of 'Awza'i, Mālik, Shāfi'i and Aḥmad b. Ḥanbal.<sup>63</sup> Conversely, Ḥanafī jurists held that if the difference of domicile occurred between the couple it is a course for immediate separation.<sup>64</sup> No waiting period is required except in the case of pregnancy.<sup>65</sup>

### a. The Majority's Arguments.

(1) The Qur'ān says:

"O ye who believe! When believing women come unto you as fugitives, examine them. God is best aware of their faith. Then, if ye know them for true believers, send them



not back unto the disbelievers. They are not lawful for the disbelievers, nor are the disbelievers lawful for them. And give the disbelievers that which they have such women when ye have given them their dues. And hold not to the ties of disbelievers women. <sup>66</sup>

The verse above indicates clearly that the cause for separation of the Muslim woman from her husband is her religion not her migration because God says neither she nor he would be lawful to each other. Therefore the reason for unlawfulness is Islam not the difference of domicile; <sup>67</sup>

(ii) It was reported that Zaynab, the Prophet's daughter, joined the Prophet in Medina leaving her husband in Mecca without conversion. When her husband embraced Islam, the Prophet returned Zaynab to her husband with the former marriage. <sup>68</sup> Had the separation of marriage inevitably occurred with the difference of domicile, it would have been held a new marriage. Hence the difference of domicile should not be a factor for immediate separation; <sup>69</sup>

(iii) It was contended that when Umm Ḥakīm converted in Mecca, her husband, 'Ikrimah refused to convert and fled to Yemen. The same happened to Safwān when his wife converted during the conquest of Mecca. There were so many similar cases wherein the partners of the marriages had not been separated albeit the difference in religion and domicile clearly existed; <sup>70</sup>

(iv) The effect of the difference in domicile

would be ultra vires for the Muslim authority with regard to its jurisdiction. But that fact alone would not by itself impair the marriage. This can be seen from the case of the unbreakable marriage as between ahl al-‘adl and ahl al-baghy, where there is no authority of one over the other. It is also true in the case of a ḥarbī musta‘min in dār al-Islām while his wife in dār al-ḥarb as well as the case of Muslim musta‘min in dār al-ḥarb and his wife in dār al-Islām where in these cases the difference in domicile is obvious;<sup>71</sup> and

(v) It is further contended that the contract of marriage is just like a contract of exchange of monetary assets or rights. It is a transaction of a countervalue like a sale or rent. Therefore it is not voidable with the difference of domicile just as the case of contracts of sale or rent.<sup>72</sup>

#### b. The Ḥanafī's Arguments

The Ḥanafī jurists relied on the same verse as quoted by the majority above. But they concluded with different interpretation as follows:

(i) The Qur'ān says: "... send them not back unto the disbelievers".<sup>73</sup> The verse suggests that the separation occurred between the Muslim woman who migrated to dār al-Islām, hence becoming a citizen of that dār, and between her husband who remains in his

religion in dār al-ḥarb. For the order not to return the migrated Muslim woman to her husband in dār al-ḥarb is self-evident that the separation is inevitable for difference of domicile.<sup>74</sup>

(ii) God says: "They are not lawful for the disbelievers, nor are the disbelievers lawful for them." The verse indicates that both of them are not lawful to each other because the difference of domicile and religion. Therefore, it is an evidence of separation for the difference of domicile;<sup>75</sup> and

(iii) God says: "And it is no sin for you to marry such women when ye have given them their dues." Here God says that it is lawful for the Muslim to marry the migrated Muslim woman provided that he pays her a bride-price (mahr) or nuptial gift. This means that her first marriage is no longer valid;<sup>76</sup>

(iv) The Ḥanafī jurists maintain further that the version of Qurṭubī, in his interpretation of the verse quoted above, is one-sided. For it clearly neglected the issue in question which is<sup>5</sup> the intention of the verse, namely the difference of domicile. For according to the verse the separation occurred between the migrated Muslim woman and her husband, who had been left behind in dār al-ḥarb. Thus it is now lawful for her to be married by a Muslim without any predicament. Therefore, the phraseology as well as the context of the verse should be taken into account as



has been mentioned by Malik himself;<sup>77</sup> and

(v) The objective of marriage is contradicted by the difference of domicile. Hence it is grounds for immediate separation. For theoretical speaking, the people of dār al-harb are regarded as non-existent. It follows that if an apostate joined dār al-harb, he will be listed as dead person. Therefore, it is inconceivable that the marriage can take place in this situation.<sup>78</sup>

It should be noted here that the difference of opinion between majority and Ḥanafī jurists here is no more than the difference in interpretation and understanding (khilāf fī al-tafsīr) of the verse in question. They all agreed that the separation is likely to take place if the husband does not join his wife with the expiry of waiting period. The main issue is therefore whether that separation is immediate, after the difference of domicile, or it occurs at some other times after the waiting period (ʿiddah). The former was the position of Ḥanafī jurists whereas the majority maintains the latter because the majority, especially the Shāfiʿī, does not consider the difference of domicile as a factor for separation.<sup>79</sup> It seems that the views of majority is more relevant in this case. This is because to subscribe to the view of the Ḥanafī school would be largely irrelevant in the light of contemporary circumstances where the

difference between the two dārs hardly exists in addition to the facilities in communication. It is also maintained that by the time of the expiry of waiting period the couple would have ample time to decide whether to remain separated or reunion.<sup>80</sup> Finally, the relevant verse does not seem to suggest emphatically (qat'1) as to the immediate separation as has been alleged by Ḥanafī jurists.<sup>81</sup>

#### D. Maintenance (nafaqah)

In this section, there are three relevant cases pertaining to the subject of this inquiry which should be discussed. They are:

1. Maintenance for a non-Muslim wife;
2. Maintenance among non-Muslims; and
3. Maintenance in the case of conversion.

##### 1. Maintenance for<sup>non-</sup>Muslim wife.

Legally speaking, it is obligatory for a husband to provide maintenance, in the forms of food, cloth and shelter for his wife. It is part of her right when the couple is legally married. There is no dispute among the jurists that such a maintenance is required by Islamic law of marriage <sup>be provided by a</sup> to a Muslim husband for his Muslim wife as well as non-Muslim kitābī wife. The Qur'ān says: "Lodge them where ye dwell, according to your wealth, and harass them not so as to make life hard for them." <sup>82</sup> And the Qur'ān says: "Let him who hath abundance spend of his abundance, and he whose provision is measured, let him spend of that which God hath given him" <sup>83</sup> On another occasion the Qur'ān says: "But he shall bear the cost of their food and clothing on equitable terms." <sup>84</sup>

The verses above indicate that the maintenance is a mandatory for the husband in accordance with his capabilities. For the command to give her a refuge



should be also construed as the command for spending on other basic needs which will vary from people to people in accordance with their social status. This command for maintenance in as much as it is for a Muslim wife, also includes the kitābī wife. For there is no evidence to suggest the command to any particular group nor do we find any evidence to its contrary.<sup>85</sup>

As for the Tradition there is a report saying that Hind bt. 'Utbah once complained to the Prophet about the stinginess of her husband, Abū Sufyān. The Prophet said to her, "Take his money in all fairness (bi al-ma'rūf) up to what will be sufficient for you and your child."<sup>86</sup> In another Tradition the Prophet in the long speech of his farewell pilgrimage was reported to have said: "As for them (wives) it is incumbent on you to provide their foods and clothing in all fairness (ma'rūf)."<sup>87</sup> From the meaning of the two traditions above, it can be said that there is no specification of Muslim wives. Therefore, it would include kitābī wives as well.<sup>88</sup>

It is worthy to note that the maintenance as it is obligatory in the time of marriage, is also made obligatory even in the time of waiting period if the divorce is revocable (raj'ī); or in the case of definite (bā'in) repudiation while the wife is pregnant. The consensus of the jurists of all schools

was in favour of this.<sup>89</sup> This maintenance after repudiation, irrespective of its category, was commonly acceptable with regards to dhimmī wives. For, the rule pertaining to the case is identical whether the wife is Muslim or non-Muslim.<sup>90</sup>

## 2. Maintenance among non-Muslims

Shāfi'ī jurists held that the maintenance is obligatory for non-Muslim husbands for his non-Muslim wife if their marriage is recognised if they take the case to the Muslim court or become Muslims. Therefore, the marriage of no witnesses or without legal guardian, for instance, would deem lawful hence the maintenance is obligatory because those marriages were recognised by the Muslim court, but not the marriage among non-marriageable persons (mahārim). For such a marriage is not acceptable to Islam.<sup>91</sup> The Ḥanbalī jurists, however, say that the maintenance is obligatory for any marriage of non-Muslims regardless of whether such a marriage is recognisable by Islam or not.<sup>92</sup>

On the other hand, the Ḥanafī jurists maintain the application of the rule of maintenance whether for the Muslim or dhimmī wife provided that the marriage is not among the non-marriageable persons. They held that the cause as well as the conditions for maintenance is identical between Muslims and non-

Muslims. Therefore, there is no evidence to separate, in ruling or treatment, between the two cases.<sup>93</sup> The same would be applied to the case of musta'min.<sup>94</sup> The Ḥanafī jurists, however, split over the issue of maintenance in the case of marriage among non-marriageable persons.<sup>95</sup>

### 3. Maintenance in the Case of Conversion.

In this case the conversion may take place either by the husband or the wife. If a husband embraces Islam but his wife, a non-kitābī, remains in her religion, the maintenance will continue uninterrupted if she is pregnant until she gives birth. For the bond of marriage remains with the pregnancy. If she is not pregnant the majority holds that her maintenance is to be discontinued from the date of her refusal to become Muslim.<sup>96</sup> It is immaterial whether she becomes a Muslim or not during her waiting period. For by refusing to become a Muslim, she was considered as a recalcitrant (nāshizah) which is entitled to no maintenance but is still entitled to shelter.<sup>97</sup> It would be recalled here that there is no difference in the maintenance of a kitābī wife.

On the other hand, Shāfi'ī, in his old version (qadīm)<sup>98</sup> held that the wife is still eligible for maintenance until the expiry of the waiting period, for there is no fault on her part which would deprive



her of maintenance. It is her husband that has changed the religion, thus the bond of marriage is there and she is his wife, in theory, until the expiry of the waiting period. Therefore maintenance should not be interrupted within that period of time.<sup>99</sup>

If it is the wife who embraces Islam, not her husband, the jurists differ over her maintenance during the waiting period. According to the majority, the wife is entitled to the full maintenance during the time of her husband's refusal. This is because he can join her at any moment thus saving their marriage. Therefore, the maintenance should not be interrupted except after the expiry of the waiting period.<sup>100</sup>

On the other hand, another opinion of Shāfi'ī and Mālikī schools hold that there will be no maintenance during that period. For the cause of separation is hers by becoming a Muslim, not her husband's.<sup>101</sup>

The view of the majority of the jurists would seem appropriate in the case of conversion regardless whether the conversion takes place from husband or wife.<sup>102</sup>

#### E. Inheritance (mirāth)

In the realm of family laws, most of the contracts can be generally divided into two categories viz. the contracts of countervalue, in nature and scope, whether in the form of monetary assets or rights, such

as sales and marriages and its related subjects which have been discussed above. The other form of contract, however, does not concentrate on countervalue but it is rather a unilateral will for the entire benefit of the other party. In other words, it is a benevolent act such as will, inheritance, endowment, charity etc. In this section we shall limit our discussion into two topics; that is inheritance and waqf (endowment).

As for inheritance, two cases will be discussed briefly here, namely, inheritance between Muslim and non-Muslim; and inheritance in the case of conversion.

#### 1. Inheritance between Muslim and non-Muslim

The jurists agreed that a Muslim can inherit from another Muslim so long as there is no impediment for it. The jurists also agreed that a non-Muslim can inherit from another non-Muslim though they disagreed over the issue of whether difference of religions or sects among non-Muslims would be an obstacle to inheritance. The consensus of jurists also maintained that a non-Muslim cannot inherit from a Muslim.<sup>103</sup> This consensus is derived because the Qur'ān and the sunnah speak clearly to that effect. The Qur'ān says: "... and God will not give the disbelievers any way (of access) against the believers."<sup>104</sup> According to the verse it is prohibited to allow the inheritance of non-Muslims from Muslims which is considered as an

access to power over the Muslims.<sup>105</sup> As for the Tradition, the Prophet was reported to have said quite explicitly: "The Muslim does not inherit from the unbeliever nor does the unbeliever inherit from the Muslim."<sup>106</sup> According to Mālik: "The generally agreed way of doing things among us and the sunnah in which there is no dispute, and what I saw the people of knowledge in our city doing, is that a Muslim does not inherit from a disbeliever by kinship, clientage (walā'), or maternal relationship, nor does he (the Muslim) overshadow any (of the disbelievers) from his inheritance!"<sup>107</sup> The texts above clearly indicate that difference of religion between the deceased and his surviving heirs would be an obstacle for inheritance unless conversion takes place as will be discussed below.

Conversely, while the jurists agreed that a non-Muslim could not inherit from a Muslim, they could not agree whether a Muslim could possibly inherit from a non-Muslim (dhimmī or musta'mīn). The majority of Companions, the followers of Companions and jurists of all schools say that the Muslim, based on the tradition above, does not inherit from non-Muslim.<sup>108</sup> On the other hand, it was reported that Mu'ādh b. Jabal, Mu'āwiyah, Masrūq, Ibn al-Musayyab, Shā'bī, Nakha'ī, and others including Shī'ī school contend that a Muslim may inherit a non-Muslim.<sup>109</sup> They argue



that since a Muslim can marry a non-Muslim woman the same rule would be applied to the case of inheritance from non-Muslim. It was also reported that when Mu'ādh was in Yemen<sup>110</sup> a case of a Jew who died survived by his Muslim brother, was brought to his attention. He said that I have heard the Prophet said: "Islam is increasing not decreasing".<sup>111</sup> It is noted here that this ruling from Mu'ādh was derived from his understanding of the text and hence was his i'tihād (the use of individual reasoning). Mu'ādh was a sound mujtahid and had been acknowledged by the Prophet to such a quality in his appointment to Yemen.<sup>112</sup>

The view of majority would seem more appropriate because of the clear and explicit tradition above which prohibited the inheritance from non-Muslims. The i'tihād of Mu'ādh however could not be justified, if it was true, with the presence of a clear text.<sup>113</sup>

Perhaps the strongest case of the argument is what was reported as follows: "Yahyā related to me from Mālik from Ibn Shihāb that 'Alī ibn Ḥusayn ibn 'Alī ibn Abī Ṭālib told him that 'Aqīl and Ṭālib inherited from Abū Ṭalīb, and 'Alī<sup>114</sup> did not inherit from him. 'Alī said, "Because of that, we have given up our portion of ash-Shāb" (A house belonging to Banū Hāshim).<sup>115</sup> This is because 'Aqīl and Ṭalīb remained in the same religion as Abū Ṭalīb whereas 'Alī and Ja'far became Muslims. We can conclude therefore that

the "doctrine of difference of religion and domicile" played a decisive role in preventing the inheritance from each other since the time of the Prophet. This principle has been followed by the Muslims until our time.

## 2. Inheritance in the Case of Conversion

The jurists have agreed that a conversion of a non-Muslim after the death of his Muslim testator (mūwarrith) would bar him from the inheritance if it had already been divided among the surviving Muslim heirs. However, even if he converted before the division of the inheritance the majority held that no share should be given to him. This is the opinion of Mālik, Abū Ḥanīfāh and Shāfi'ī.<sup>116</sup> Conversely, another opinion of Mālik, Ibn Ḥanbal and Shī'ī school maintain that the man could share with the others.<sup>117</sup> Furthermore, this latter view maintains that if some of the property had been divided, the man would share the rest of it. The same rule applies to a wife if she converts before the division of the legacy provided that the conversion occurs during her waiting period.<sup>118</sup>

### a. The Arguments

(i) The majority rely on the previous Tradition that a non-Muslim does not inherit from a Muslim, as the impediment exists at the time of the death, hence

there will be no inheritance in such a case. It is further argued that by the death of the deceased the legacy has transferred to the possession (al-milk) of the existing Muslim heirs. Thus conversion after the demise should not change the present status quo and would give him no right to share with the others. Therefore, legally speaking, the conversion makes no difference to him whether or not the legacy has been divided.<sup>119</sup>

(ii) The verse pertaining to the inheritance such as: "And unto you belongeth a half of that which your wives leave, if they have no child...."<sup>120</sup> indicates that the legacy becomes due and hence the possession of the heirs from the moment of the death, after clearing the wills and debts, without dependence on its division. Therefore, that right to possession should not be affected and alienated by the conversion after the legacy had become theirs and they were merely waiting for division.

(iii) The rule of inheritance or the law of succession has become established. It has no effect on it whether the legacy has been divided or not. It is like the rule of interest after its prohibition. For its rule stands (the same) whether the deal of interest has been properly executed or not.<sup>121</sup>

On the other hand, the opposing view argues that:

(1) To let the new converted heir share the legacy



is to encourage him to embrace Islam then leave under the realm of Islam.<sup>122</sup>

(11) The Prophet was reported to have said: "Any division (of legacy) which had been divided in the days of pre-Islam was in accordance with the rule of the day (jāhiliyyah), and any division which falls under Islam (which has not been divided) it will be in accordance with the rule of Islam.<sup>123</sup> According to this Tradition the mode of division, hence its beneficiaries, depends on its rule of whether they belong to Islam or otherwise. So the demarcation point to be considered is the time of division of the legacy not at the time of death. But according to Ibn Ḥazm the Tradition above is in the category of mursal which is not accepted by all scholars.<sup>124</sup>

The majority seems to have stronger evidences and arguments.<sup>125</sup>

#### F. Endowment (waqf)

According to Kāsānī waqf means an act of waiving the ownership of one's property for the sake of God,<sup>126</sup> or more generally to set apart his own property for charitable purposes.<sup>127</sup> It is an act of benevolence which has been practised by the Prophet and his Companions.<sup>128</sup> The jurists however have formulated some conditions for the endower (wāqif) to be eligible to make an endowment. He must inter alia,

possess a capacity to give to charity, that is, he has attained the age of puberty, has a sound judgement and finally, the purpose must be for the sake of God.<sup>129</sup>

### 1. The Endowment of non-Muslims

There is no dispute among the jurists that a non-Muslim can make an endowment for Muslims. For no jurists would say that Islam is something which prevents an endowment.<sup>130</sup> If a dhimmi endowed his property for his children and his descendants and finally for the poor, his endowment is legally valid. Hence both the poor of non-Muslims as well as Muslims would be eligible to it except if he specifically mentioned that the endowment was only for the poor of ahl al-dhimma, then the executor should fulfil his wish.<sup>131</sup> If a dhimmi, in his deed of endowment, provides that his property is for his descendants, then for the poor, but if anyone from among his descendants becomes a Muslim, he should be excluded from the endowment, the said endowment is valid according to his deed.<sup>132</sup> This is because the endower is the owner of his property. He can dispose of his property at his free will provided that it is not for sinful activities.<sup>133</sup> For according to Ḥanafī jurists the endowment must be made only for the sake of God and it must be for common good both to the Muslims and the non-Muslims depending on one's respective belief.

For instance, the endowment for the poor (Muslims and non-Muslims), for Jerusalem (bayt al-Maqdis), etc.<sup>134</sup> If the purpose of the endowment is no good for either Muslims and non-Muslims, or each of them the endowment is not valid such as, it is made for the criminals or the prostitutes or the like.<sup>135</sup> It is worthy to note that in addition to the endowment for a Muslim, a dhimmī can do the same for a dhimmī, but Ḥanafī jurists held that as a Muslim cannot endow a musta'min, the same applies to the dhimmī.<sup>136</sup> This is simply because the musta'min is an alien resident and by no means would his right be equal with the dhimmī. However, if the endowment is for all people, the musta'min would certainly enjoy the same entitlement as others.

The Mālikī, Shāfi'ī and Ḥanbalī jurists share the Ḥanafī's view that a dhimmī can endow a dhimmī or a Muslim. But Shāfi'ī jurists held that a dhimmī can endow a musta'min.<sup>137</sup> Mālikī jurists, however, maintain that a dhimmī cannot make an endowment for the sole religious purposes of the Muslims such as building a mosque; but if it is for mundane purposes such as building a hospital, school, bridge, etc. the endowment is perfectly valid.<sup>138</sup> On the other hand, the Shāfi'ī and Ḥanbalī jurists held that a dhimmī can <sup>for</sup> endow a mosque, for the criterion is subject to and in accordance with the Muslim's belief not that of the



dhimmi. The general rule is therefore any endowment which is not valid from the Muslims is likewise considered as not valid from a dhimmi such as the endowment for unspecific person or category of persons.<sup>139</sup>

## 2. Endowment for non-Muslims

The jurists of different schools have agreed that a Muslim can make an endowment for a dhimmi and musta'min<sup>140</sup> with some condition, inter alia, that the motive of the endowment must not for ma'siyah (sin) purposes or the like.<sup>141</sup> In other words, the endowment must not go against the teaching of Islam.<sup>142</sup> For example, a Muslim may endow his property for the exclusive use of the poor and the needy of non-Muslims but he cannot endow his property to <sup>be</sup> used for drinking wine or other sinful purposes, for such activities are obviously against the basic teachings of Islam.<sup>143</sup>

There are at least two textual evidences that support the view above:

a. The Qur'ān says: "And feed with food the needy wretch, the orphan and the prisoner, for love of Him. (Saying): We feed you, for the sake of God only. We wish for no reward nor thanks from you."<sup>144</sup> In another occasion the Qur'ān says: "God forbiddeth you not those who warred not against you on account of religion and drove you not out of your homes, that ye

should show them kindness and deal justly with them. Lo! God loveth the just dealers."<sup>145</sup>

The first verse indicates that the endowment for non-Muslims which is a charitable gift (ṣadaqah) is not only permissible but deserves a reward and commendation from God. The prisoners in the verse are usually understood as from non-Muslims.<sup>146</sup> The second verse suggests the permissibility, in general, in giving ṣadaqah to non-Muslims who are not hostile to Muslims. Consequently, the ḥarbī would be excluded by implication.<sup>147</sup> According to Zamakhsharī it was alleged that this verse was revealed to correct the attitude of Asmā' bt. Abī Bakr, who refused to give hospitality to her mother who was disbeliever when the latter visited the former. After this revelation the Prophet ordered Asmā' to welcome her mother.<sup>148</sup> The verse also suggests that there is no harm for the Muslims to establish and maintain social as well as friendly relationships with non-Muslims especially the dhimmīs.<sup>149</sup>

b. It was reported that Ṣafīyyah bt. Ḥuyay, the wife of the Prophet, has endowed her brother who was a Jew. Had the act been forbidden it would have been disapproved of and corrected by the Prophet. But no report to suggest to the contrary from the Prophet. Therefore, the endowment to non-Muslims is acceptable to Islam.<sup>150</sup>

It is needless to point out here that the jurists of all schools agreed that the endowment for ḥarbī and apostate is invalid,<sup>151</sup> for both of them are considered to be in the state of uncertainty whereas endowment is a perpetual gift (ṣadaqah jāriyah). As the endowment is not to be made except from a long lasting subject it is likewise with respect to the beneficiaries.<sup>152</sup>

It should be noted here that of late, the Egyptian legislation pertaining to waqf of dhimmī has been enacted. Article seven provides that, "The endowment of non-Muslim is valid so long as it is not forbidden according to his religion and Islamic law."<sup>153</sup> This provision means that the endowment of non-Muslims, whether Egyptian or foreigner, is not lawful if both laws, Muslim and non-Muslim, deem<sup>that</sup> it is unlawful to make such<sup>an</sup> endowment. However, if both or one of the laws permits it is to be considered as lawful. It can be concluded that the endowment made by a non-Muslim to a Muslim or vice versa is lawful according to the above provision.<sup>154</sup> As for the term of reference to the things forbidden it should be agreed by all schools in the case of Islamic law, and it should be known to be forbidden or accepted to all in the case of non-Muslim's religion.<sup>155</sup>



G. Witness (shahādah)<sup>156</sup>

At the outset it should be stated that there is no difference in opinion among the jurists of different schools that a Muslim can give testimony or be a witness for and against a non-Muslim. This agreement stem from the conception that since Muslims can be a witness for each other, it would likewise hold true that a Muslim would therefore possess a capacity to become a witness for or against a non-Muslim.<sup>157</sup>

a. Witness of non-Muslim

The dispute, however, arises among the jurists about whether a non-Muslim could possibly become a witness for a Muslim. As a rule, they generally agreed that it is not to be accepted except in certain cases.

According to Mālikī jurists the testimony of a non-Muslim could not be accepted except a testimony of a non-Muslim doctor<sup>158</sup> such as in determining the extent of imperfection of someone, the wounds, or the like. They said that such a testimony is accepted because of its necessity.<sup>159</sup> The prevailing view in Ḥanafī school held that it is not to be accepted except in certain cases such as in case of need.<sup>160</sup> The strictest view in this case is from Shāfi'ī school which held that in no circumstances will the testimony of a non-Muslim be accepted, whether it is for or against a Muslim, in travelling or otherwise.<sup>161</sup>

On the other hand, Ḥanbalī and Zāhirī<sup>jurists</sup> as well as

al-Thawrī and al-Awzā'ī maintain that a non-Muslim could be a witness for a Muslim, while travelling in a will cases only provided that no Muslim was present at that time.<sup>162</sup>

a. The Arguments

Those who held that no witness could be accepted from a non-Muslim, rely on these evidences:

(i) The Qur'ān says: "And call to witness, from among your men, two witnesses, And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses."<sup>163</sup>

(ii) The Qur'ān says: "... and call to witness two just men among you, and keep your testimony upright for God."<sup>164</sup>

The two verses above require two conditions from a witness namely, to be just and to be a Muslim. It is not sufficient to be a Muslim alone. Therefore the majority holds that the verses above have excluded a non-Muslim from being a witness.<sup>165</sup>

(iii) The acceptance of a non-Muslim's testimony or as a witness would oblige a Muslim judge to rule in accordance with that testimony. Hence, it appears that a non-Muslim has some sort of authority over a Muslim. A situation which is not acceptable to the jurists.<sup>166</sup>

The opposing view however relies on these evidences:

(i) The Qur'ān says: "O ye who believe! Let there

be witnesses between you when death draweth nigh unto one of you, at the time of bequests - two witnesses, just men from among you, or two others not from among you, in case ye are journeying in the land and the calamity of death befall you."<sup>167</sup>

The verse above suggests that while travelling and if there is no Muslim, it is permitted for whoever is present, even though non-Muslims to be witnesses in matters of will or bequest. Therefore in this case a dhimmī could become a witness for a Muslim. This is also the view of Abū Mūsā and Shurayḥ.<sup>168</sup>

(ii) It was reported that Ibn 'Abbās when reciting the verse above added that "from the People of the Book." This act of Ibn 'Abbās, who was considered as one of the authority on the Qur'ān, must be in accordance with what he had heard or taken from the Prophet.<sup>169</sup>

(iii) The Companions of the Prophet accepted the witness of a non-Muslim while travelling on matters of will. Abū 'Ubayd reported that Ibn Mas'ūd had done so in the time of 'Uthmān.<sup>170</sup>

(iv) The acceptance of a non-Muslim witness is a matter of practicality and necessity at one time. For it is inconceivable that in such a critical moment with no single Muslim present while the man is away from his home, a non-Muslim could not be considered as a witness of the will. In this situation, it is like



the case of tayammum<sup>171</sup> when there is no water, or the weak who has to break his fasting during Ramaḍān, or eating of carrion or swine-flesh in the time of necessity.<sup>172</sup> For it is an acceptable rule that "necessity could ward off prohibition". It is a practical solution for the man who probably had not paid his alms-giving, or settled his debts, or wanted to contribute for some charity purposes in the form of ṣadaqah endowment or the like.<sup>173</sup>

The view which says that a non-Muslim witness or testimony for a Muslim can be accepted in the time of necessity would seem to be preferable because of its stronger evidences as discussed above.<sup>174</sup> This is in addition to the compatibility with the spirit of Sharī'ah. For it is not proper to put obstacles on the way of people's interaction in the present time where the relationships in trade and other sphere of human activities between the Muslims and non-Muslims has become so complex and inseparable.<sup>175</sup> Moreover, Ḥanbalī jurists maintain that the cause (ʿillah) for permissibility of a non-Muslim witness is necessity. Therefore, it can be applied for any case of necessity regardless whether travelling or otherwise, in matters of will or any other matter, especially in business transactions.<sup>176</sup>

## 2. Non-Muslim Witness on Muslim Marriage

There is no dispute among the jurists that in the contract of marriage between the Muslims, two Muslims witnesses are required. But in the case of a Muslim who marries a dhimmī woman, a controversy arises over the validity of the witnesses being two male dhimmīs. In other words could non-Muslims be witnesses of intermarriage between a Muslim and a dhimmī woman? Abū Ḥanīfah and Abū Yūsuf hold that it is acceptable and the marriage is valid.<sup>177</sup> It is immaterial for them whether the religion of the wife and the witnesses is identical or not. But Mālik, Shāfi'ī, Shaybānī, Zufar and Aḥmad b. Ḥanbal maintain that the marriage is not valid.<sup>178</sup> For they are of the opinions that Islam is a prerequisite for the witness whether the marriage is of Muslim or non-Muslim wife. It would seem that the majority view is more appropriate in the light of the evidences discussed above where the non-Muslim witnesses could be accepted only in certain cases.<sup>179</sup>

## 3. Witness Among non-Muslims

All schools except Ḥanafī agreed that non-Muslims cannot be a witness for each other. They rely on the verse: "And call to witness, from among your men, two witnesses. And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses...."<sup>180</sup> The verse indicates that the witness

can only be had recourse to with approval. Hence according to those schools, the witness among non-Muslims for each other could not be accepted due to lack of approval.<sup>181</sup> However, Ibn Taymiyyah (d. 728 A. H. ), a Ḥanbalī jurist accepted the witness of dhimmī for each other and contended that it is a riwāyah (report) from Aḥmad b. Ḥanbal.<sup>182</sup> Conversely, Ḥanafī jurists maintain that the witness among non-Muslims is acceptable with the following conditions:

a. Dhimmī can become a witness for each other though they are from different sects so long as they are good (ʿudūl) in their religion.<sup>183</sup> The Ḥanafī jurists argued that if a Muslim can be a witness for a Muslim so does a dhimmī for a dhimmī. It is also contended that a Muslim usually does not involve in the affairs of non-Muslims. Therefore, it is imperative that they can take up witnesses among themselves in case there is a need for it.<sup>184</sup> In addition, they also rely on the verse: "And those who disbelieve are protectors (awliyā') one of another...."<sup>185</sup> If non-Muslims are protectors of one another, so the question of witness, which is less significant, is also to be construed as included by implication. For the protection or guardianship is more significant than that of witness.<sup>186</sup>

b. A dhimmī also can become a witness for musta'min but not vice versa, for it is held that a



dhimmī is considered, by the pact of dhimmah, as closer to Muslims and higher in status than musta'min since they are residents of dār al-Islām.<sup>187</sup> Kāsānī formulated the rule for them as "the rule of witness as between musta'min and dhimmī is as the rule of dhimmī to a Muslim";<sup>188</sup> and

c. The witness of musta'min, however, is accepted to each other if they are from the same dār and same sect otherwise their witness will not be accepted. For the difference in "domicile" will bar them from guardianship (wilāyah) and inheritance. Since witness is a kind of guardianship.<sup>189</sup> With regard to the witness of dhimmī for musta'min, the question of different dār is immaterial because of his position in dār al-Islām as stated above.

The view of the Ḥanafī jurists would seem more appropriate for the reasons stated above. It would also seem reasonable to accept the witness of musta'min for each other though they come from different dār.<sup>190</sup> For the concept of different dār for them is almost irrelevant in the context of the present situation. We would also accept the witness of musta'min for dhimmī for the same reason.<sup>191</sup> Moreover, being a witness is based on the trustworthiness of each person, and this could be found in a musta'min. This is in addition to the fact that in witness there is no religious or spiritual element involved.<sup>192</sup>

### III. The Law of Contracts and Obligations

#### A. In Dār al-Islam

At the outset we would like to point out that the objective of this section is to develop a framework that will allow us to comprehend briefly the Islamic notions of contracts and obligations. This would then be helpful in drawing a conclusion about the relationship between Muslims and non-Muslims in this respect.

Unlike other fields of law, where there is a considerable number of revealed texts provided as a guideline, such as in criminal and family laws,<sup>1</sup> the Islamic law of contracts or rather the field of business transactions (mu'āmalāt) receives less attention from the main sources of the Islamic law. However, the Qur'ān and the sunnah provide general broad rules and principles<sup>2</sup> leaving its details to be developed, at later stage, by the jurists. The task of the jurists therefore, in this regard, is so enormous that no single jurist or school could ever have developed it without the help of the others. This is in one sense due to the flexibility of Islamic law, and in another in order to cope with the practicality of the contemporary needs which might be varied from place to place and from time to time. It is these two characteristics of the Islamic law that enable it to be relevant to the present time.

Generally speaking, in business and trade, everything that is allowable for a Muslim is likewise allowable for a non-Muslim; conversely, anything that is prohibited for a Muslim, is prohibited for a non-Muslim as well except otherwise in certain cases such as that of liquor and pigs.<sup>3</sup> For these two items have been made specially excepted by the terms of the contract (‘aqq al-dhimmah).<sup>4</sup> Therefore, we can say that a non-Muslim enjoys the same rights and obligations as a Muslim in the field of the contractual obligations or business transactions (mu‘āmalāt). This equality is applicable to all legal obligations emanating from any contract concluded as between Muslim and non-Muslim. It is also true with respect to all dealings pertaining to worldly affairs.

According to Ḥanafī jurists a dhimmī is treated like a Muslim in terms of his liability under Islamic law pertaining to mu‘āmalāt because he is the subject of the Islamic state.<sup>5</sup> Jaṣṣāṣ held that the dhimmī is treated like the Muslim in terms of his contract of sales, inheritance, and any other business transaction where Islamic law is applicable to him except that of liquor and pigs. For both commodities are recognised as their property.<sup>6</sup>

It follows that any contract which is deemed void and unlawful according to Islam such as a contract that is based on usury and the like<sup>7</sup> would



necessarily be unlawful for the dhimmī.<sup>8</sup> It was reported that the Prophet wrote to the Christians of Najrān to cease taking the interest in their dealings or face war from the Prophet.<sup>9</sup> The Qur'ān says:

"And if ye do not, then be warned of war (against you) from God and His messenger. And if ye repent, then ye have your principal (without interest). Wrong not, and ye shall not be wronged."<sup>10</sup>

It is clear therefore that a dhimmī, in doing business in the Islamic state, has to follow the Islamic law of contract. It should be noted that in business transactions the faith of the contracting parties does not stand as a barrier for any contract to be deemed valid and lawful. This means that Islam is not a condition for a valid contractual obligations.<sup>11</sup> To this was the consensus of all jurists from different schools.<sup>12</sup>

The principle above as it applies to dhimmī is also true with respect to musta'min. For according to Hanafī jurists the position of musta'min in dār al-Islām in the field of mu'āmalāt is identical to that of dhimmī.<sup>13</sup> The fact that he applies for amān status is sufficient to suggest that he is ready to be governed by and in accordance with the relevant laws applicable to him. For the law is enforceable so long as he remains in dār al-Islām.<sup>14</sup> Therefore, he will be treated as the dhimmī in all his dealings whether with Muslims or non-Muslims.<sup>15</sup> In the words of

Sarakhsī, "A musta'min as long as he is in dār al-Islām is obliged to follow Islamic law pertaining to mu'āmalāt as is the dhimmī. This is the opinion of Abū Yūsuf and Shāfi'ī."<sup>16</sup>

This principle of equal treatment before the law in trade and commerce, formulated by Ḥanafī jurists, is also shared by other jurists of different schools. According to Shāfi'ī "All sales which are deemed invalid among the Muslims, are likewise invalid among non-Muslims; however, if it had occurred and the transaction had been completed, we shall not revoke it. But we shall revoke the existing one."<sup>17</sup> This statement of Shāfi'ī is in complete harmony with the view of Ḥanafī jurists. Ḥanbalī jurists however say that if a dhimmī revives dead land, the title to the land will be his just as it would be for a Muslim.<sup>18</sup> This equal treatment also discussed by the jurists in contracts such as rent (ijārah),<sup>19</sup> pre-emption (shuf'ah),<sup>20</sup> profit-sharing (mudārabah),<sup>21</sup> business partnership (sharikah)<sup>22</sup> agricultural share cropping (muzāra'ah),<sup>23</sup> etc. In the word of al-Marāghī, "All jurists agreed that non-Muslims are treated, in the field of business transaction (mu'āmalāt) and penal law (uqūbāt) as Muslims. For the objectives of transactions, such as selling and buying, is for worldly purposes which is of common interest to all."<sup>24</sup>

### 1. Some Exceptional Cases

We have pointed out earlier that as a general rule a non-Muslim will be treated as a Muslim in the field of mu'āmalāt in dār al-Islām. However, there are some exceptional cases to the rule, which the jurists have reached, although there are some difference of opinions over some cases.

#### a. Liquor and Pigs

According to Ḥanafī and Zaydī jurists non-Muslims are allowed to trade, in addition to consuming, both liquor and pigs in dār al-Islām. But both items are strictly forbidden to Muslims. They are allowed to do this because both commodities are recognised as valuable properties for non-Muslims.<sup>25</sup> This is part of Islamic tolerance towards non-Muslims. Had it not been the case there would have been no trace of it in the Muslim countries. This gesture has been generally practised by the Muslims throughout history. It was reported that the Muslims collected ‘ushr (tithe), kharāj, and jizyah from pigs and liquor of dhimmī.<sup>26</sup> When ‘Umar I heard about it, he ordered the dhimmī to sell the pigs and liquor and pays the taxes from its prices. Had it not allowed selling of those items for the dhimmī, there would not have been the order to sell it.<sup>27</sup> There is also a report agreed by the jurists that the Muslims collected jizyah and kharāj



from the prices of both items.<sup>28</sup> On the other hand, Abū 'Ubayd reports that both 'Umar I and the II prohibited taking 'ushr from both commodities. For it was reported that the Prophet has said: "Verily if God prohibited something it will include its price."<sup>29</sup> The reason behind this prohibition being that 'ushr would then be a tax on the liquor and pigs themselves which would be indistinguishable from their prices; whereas in the case of jizyah and kharāj the tax is taken from dhimmī's property no matter where he got that from.<sup>30</sup> It is interesting to point out that Abū 'Ubayd in his comment says that the opinions as well as the practises of the two Caliphs are preferable.<sup>31</sup>

It seems to be that there are two conflicting reports from 'Umar I in the case of taking 'ushr from the price of liquor and pigs.<sup>32</sup> To resolve the problem it can be said that probably Abū Ḥanīfah and Ibrāhīm al-Nakha'ī applied the rule of analogy (qiyās), which is one of the sources of the Islamic law, to the decision to take the price of both commodities for paying jizyah and kharāj which was hitherto approved by 'Umar I himself. Since the price has become dhimmī's property thus it liable for 'ushr.

This conclusion is vital for practical reasons in our time. For the permission to consume both commodities for non-Muslims would necessitate the approval of manufacturing, trading, and importing

them. These transactions however need to be regulated and, to some extent, supervised by the state. Such activities would require the income derived to be taxed according to the modern notion of taxation.

What we have said about dhimmī is also applicable to musta'min.<sup>33</sup> In the case of conversion however it would naturally change the validity of the transaction. This could be seen from the following cases. If a non-Muslim purchases liquor or pig from another non-Muslim, then before the deal is completed one or both of them is converted to Islam, the deal would naturally null and void.<sup>34</sup> But if the conversion takes place after the deal had been completed, there will be no effect on the deal.<sup>35</sup> This is because the transaction had taken place completely before the conversion. There is nothing which would change his ownership and benefits from the transaction by the conversion. It is the same as if juice owned by a Muslim became fermented and hence alcoholic, his ownership of the juice remains unaffected.<sup>36</sup>

#### b. Vandalism to Liquor and Pigs

The act of vandalism to both these commodities also receives attention from the jurists. They do not agree however as to whether or not the vandal would be liable for the offence. Hanafī jurists say the robber (ghāsib) or vandal (mutlif) should pay the

compensation to non-Muslim owner,<sup>37</sup> for it is a valuable property for non-Muslims but not to the Muslim owner. It is also the view of Mālikī jurists provided that the dhimmī does not over expose them to the Muslim.<sup>38</sup> On the other hand, Shāfi'ī and Ḥanbalī jurists maintain that there should be no compensation for the damage irrespective of whether the owner is Muslim or non-Muslim and the offender is a Muslim or otherwise.<sup>39</sup> Their rationale is that anything that is not to be compensated for for the Muslim, will be the same for a non-Muslim.<sup>40</sup>

Although this view seems to be consistent with the principle of equal treatment in mu'āmalāt for both Muslim and non-Muslim, the view of the Ḥanafī school is more relevant in this case because both commodities are properties of the dhimmī, and the dhimmī is under the guarantee and protection of the state as to his life and property. To say otherwise would be undermine that security and would put his property in the state of non-protection which is repugnant to the contract of dhimmah.<sup>41</sup>

### c. Employment Relationship

In the field of industrial relations, the jurists of all schools unanimously agreed that a Muslim can be employed by a dhimmī for any economic activity so long as the type of work is not repugnant to Islamic



teachings.<sup>42</sup> It was reported that 'Alī b. Abī Tālib was employed by a Jew for irrigation work. The news reached the Prophet and he did not disapprove of it,<sup>43</sup> for it reflects a full sense of contractual obligations, normally concluded by an offer and an acceptance, hence it is a free bilateral<sup>44</sup> agreement like a sale which forms the core of the Islamic law of contract.<sup>45</sup> It is clear therefore that the Muslim as well as the non-Muslim are permitted to establish an employment relationship in the field of economic activities.

#### d. Business Partnership

Trade and business have become life and blood of each community in today's life. The Prophet is reported to have said: "O God! Give your blessing to my ummah for their effort, or endeavour (including in trade and business), early in the morning."<sup>46</sup> Hence, the Prophet urges the Muslims to be an early bird<sup>47</sup> so that he shall obtain more blessing and subsistence from God. In seeking livelihood the Muslims should exert all possible means including cooperation and joint partnership with non-Muslims. We have pointed out that Islam is not a condition for business partnership (sharikah).<sup>48</sup> Thus, the Muslim can enter into joint venture with non-Muslim, dhimmī or musta'min, in commercial activity. The only

restriction is that the activity, again, as above, must not go against the teachings of Islam. It is for this reason that some jurists such as Shāfi'ī,<sup>49</sup> expresses caution and regard it is reprehensible (karāhah) for a Muslim to have a joint partnership with non-Muslim, in commercial activities, for fear of ribā and other unlawful transactions. The fear was based on a tradition reported from Ibn 'Abbās that he has said: "Do not share (trade) with Jews nor Christians nor Magians because they are taking an interest which is prohibited."<sup>50</sup>

On the other hand, Ḥanbalī jurists maintain that the fear of Shāfi'ī could be resolved by, for instance, setting a standard policy as not to contradict the Islamic law of contract or alternatively, the Muslim may share his non-Muslim partner in making and deciding the matter.<sup>51</sup> In so doing, the Muslim is permitted to join the non-Muslim entrepreneurs in trade and commerce. Therefore, the view of Ḥanbalī jurists, with its provision, seems preferable in this case.<sup>52</sup> Furthermore, Ibn Qudāmah comments that the Tradition quoted is an isolated one (ḥadīth al-āḥād) which had not been proved to be acceptable to all the Companions of the Prophet.<sup>53</sup> On the contrary, it was widely accepted that the Prophet has made many deals with non-Muslims.<sup>54</sup>

e. Representation or Agency (wikālah)

The jurists also agreed that the representation or agency between Muslim and non-Muslim is permissible. This view has been expressed by both Ḥanafī and Ḥanbalī jurists.<sup>55</sup> The rule requires that whoever can conduct or dispose any affairs for himself, is, in fact, entitled to appoint his own representative, be it a woman, Muslim or non-Muslim.<sup>56</sup> If a Muslim appoints a non-Muslim on matters that he is in the capacity to perform it, the representation is legally valid regardless whether the representative is a dhimmī, musta'min, ḥarbī, or an apostate. This is simply because Islam is not a condition in the case of sale or broadly speaking mu'āmalāt.<sup>57</sup> If a Muslim appoints another Muslim, then the latter became an apostate, the representation would not become void. This is true whether he joins dār al-ḥarb or otherwise.<sup>58</sup> But Abū Ḥanīfah says that if he joins dār al-ḥarb, the representation would be null and void.<sup>59</sup>

B. In Dār al-Ḥarb

Unlike in dār al-Islām, the jurists hold two opinions over the rule pertaining to business transaction in dār al-ḥarb. The central issue however remains the same as has been discussed in criminal law, namely whether different dār (domicile) would essentially change the law and its liability.



### The First Theory

This theory was formulated by Ḥanafī jurists, except Abū Yūsuf, who held that any contract concluded between Muslim or dhimmī and ḥarbī is ineffective or bears no legal effect. If a Muslim or dhimmī concluded a contract of loan, for instance, with ḥarbī or vice versa, then they returned to dār al-Islām followed by the ḥarbī as musta'min, the Muslim judge has no capacity or jurisdiction to try them.<sup>60</sup> This is also true in other cases involving the said parties in dār al-ḥarb.<sup>61</sup> For according to those jurists any transaction therein would finally be of no avail because of the lack of jurisdiction. The same case will be held if there is a contract between two ḥarbī when they came to Muslim judge as musta'min. However, the Muslim or dhimmī or ḥarbī, while living in dār al-ḥarb, should restrain from doing any harm to each other because the rule of amān is applicable to all of them.<sup>62</sup> On the contrary, the rule will be different if the contract was concluded among the residents of dār al-Islām when they were in dār al-ḥarb. This is because the Muslim judge has complete jurisdiction over them when they return, even though the contracts were concluded abroad, and also from the the fact that they are residents of dār al-Islām.<sup>63</sup>

### The Second Theory

This is the theory of the Shāfi'ī and Ḥanbalī schools which held that any transaction, regardless of the parties involved, is legally valid and could be heard in Muslim court. In other words, according to this view there is no territorial restriction. The emphasis is now made on the kinds of contracts, whether they are lawful or otherwise, not to the place or persons involved. This is true whether the parties involved are two ḥarbīs, or between a ḥarbī and Muslim or dhimmī, or between the residents of dār al-Islām who entered dār al-ḥarb as amān.<sup>64</sup>

Their argument was that by virtue of amān alone it is incumbent upon the contracting parties, Muslim and non-Muslims alike, to honour and fulfil it. For amān means restraint and non-aggression against each other. If there is a contract concluded between a Muslim or a dhimmī and ḥarbī, each party has to fulfil and honour his obligation otherwise the remedy will be sought through the court of law.

To illustrate the case in point, the Ḥanbalī jurist even went to the extent that if a Muslim prisoner of war has been given a condition by non-Muslim captors that he would be allowed to go out and find ransom for himself; the Muslim should undertake that and fulfil it.<sup>65</sup> To support their argument they rely on many verses of the Qur'ān such as, "Fulfil the

covenant of God when ye have covenanted...."<sup>66</sup> They also quoted the treaty of Ḥudaybiyyah where the Prophet had fulfilled his promise to send back to Mecca any Muslim, but not women,<sup>67</sup> who emigrated to Medina before the conquest of Mecca.<sup>68</sup> The Prophet was reported to have said in this regard: "Verily the treason is not the practice in our religion."<sup>69</sup> As for the Muslim prisoner, having undertaken the promise, he should fulfil it as in the obligation to pay the price when the sale had been finalised. However, if he was unable to pay the ransom, there were two conflicting opinions within the school.<sup>70</sup>

Thus, according to the second theory any transaction, regardless of the faith of the parties involved, should be honoured and fulfilled, for the rule of Islam is ultra territorial and the Muslim must be consistent in observing the Islamic law no matter where he lives. The fact that the contract was concluded in dār al-ḥarb does not by itself deny the contractual obligation.<sup>71</sup> Moreover, although the jurisdiction of the Muslim court was not there at the time of concluding the contract, as alleged by the Ḥanafī school, its jurisdiction is relevant in the time of hearing in dār al-Islām. To subscribe to Ḥanafī's view would undermine and contradict with the established concept of amān which has been given to either Muslim, dhimmī, or ḥarbī.<sup>72</sup>



## CHAPTER FIVE

### Dhimmī's Religio - Socio - Political Status

#### Introduction

In this chapter we shall try to throw some light on the dhimmī's position in the social and cultural dimensions including the political aspect as seen from the Islamic point of view. Naturally, some materials used in this chapter, in addition to the classical texts which had been used in the previous chapters, would be relatively recent, as will be seen. This is due to the fact that in some cases the classical jurists had not dealt with it either because the subject itself was not relevant to their times or the problem is new in its nature which necessarily needs a new interpretation. The discussion below will enable us to see more objectively the dhimmī's rights and position in its normative frame work as sanctioned by the texts and authoritative interpretation. This situation, however, would, in some cases, be paradoxical with the existing non-Muslim's position in some contemporary Muslim countries. The task of the writer therefore is extremely difficult to try to resolve or perhaps to justify between the many anomalies in the practices of the time.

## I. Religion

Perhaps the most illuminating evidence prescribed by the Qur'ān, in its attitude towards the non-Muslims, is the award of the religious freedom. The Qur'ān unequivocally states: "Let there be no compulsion in religion. For truth stands clear from error."<sup>1</sup> It means that the residing subjects as well as the temporary sojourners have the assurance and guarantees, from God, regarding their safety and <sup>the</sup> ~~its~~ liberty of their conscience. Hence, every adherent of each religion would have his own way and manner of practising his religion, uninterrupted, in accordance with its teaching. So the question of compelling someone to convert to Islam, is not only unlawful, from legal point of view, but unjustified and crime in Islam.<sup>2</sup> It follows that every interference, by the Muslim authority, on matter of a non-Muslim's religion would be against the basic tenets of Islam. For the concept of freedom in religion is a matter of immutable principle rather than a policy which is subject to change from time to time depending on the policy makers' decision. Thus the Qur'ān says "And if thy Lord willed, all who are in the earth would have believed together. Wouldst thou (Muḥammad) compel men until they are believers."<sup>3</sup> According to Zamakhsharī the power to compel men to become believers rests in God alone.<sup>4</sup> This is confirmed by the succeeding verse

which read: "It is not for any soul to believe save by the permission of God. He hath set uncleanness upon those who have no sense."<sup>5</sup>

The above verses were revealed in sharp contrast to the temper of the age which was marked with forced conversion, intolerance, interference, and persecution.<sup>6</sup> In the then civilized world, the Byzantines forced their subjects to choose between the state religion or death. They also killed Jacobite Christians and others who did not adhere to the sect chosen by the state.<sup>7</sup> On the other hand, the Qur'ān prohibited forced conversion, for when God guides a person, he would naturally embrace Islam with full faith and discerning consciousness. It is useless therefore, to attempt to bring about his conversion to Islam by force, as faith, for the Muslim, is not the mere recitation of liturgical phrases, but rather the sincere acceptance, total obedience and submission to its demands.<sup>8</sup> It is for this reason that there are only exceptional cases of Muslims forcing any non-Muslim subjects to embrace Islam, a fact which is acknowledged by western historians.<sup>9</sup>

Nonetheless, the Qur'ān urges the Muslims to spread Islam worldwide by using the art of persuasion and convincing the people. But the call to Islam (da'wah), by peaceful means, <sup>is</sup> one thing and forcing the people, against their will, is something else. The



Qur'ān says: "Call unto the way of thy Lord with wisdom and fair exhortation, and reason with them in the best of manners."<sup>10</sup> For the same attitude the Qur'ān says (in the words of Noah):

He said: O my people! Bethink you, if I rely on a clear proof from my Lord and there hath come unto me a mercy from His presence, and it hath been made obscure to you, can we compel you to accept it when ye are averse thereto?<sup>11</sup>

This is another clear proof of no compulsion in religion.<sup>12</sup>

On the other hand, one may aptly ask what guarantees can the Muslim authority offer to non-Muslims with respect to this freedom?<sup>13</sup> In response to this question, perhaps it may be appropriate to recall the guarantees provided by the Prophet to the Christians of Najrān, with whom the first pact of dhimmah had been concluded.<sup>14</sup> Among other things, the covenant declares that the non-Muslims will be placed under the protection of God and His Prophet, provided for the safeguarding of their lands, wealth, religion and churches.<sup>15</sup> According to Abū Yūsuf this covenant had been honoured and left intact by all the four Guided Caliphs.<sup>16</sup> It is to be observed here that the two significant terms used in that treaty, i.e. ḥiwār Allāh and dhimmah Muḥammad literally the former means neighbourly protection whereas the latter

signifies protection, responsibility, inviolability etc.<sup>17</sup> From legal point of view and as far as the language of the treaty is concerned, the employment of those two terms, by the Prophet, is considered to be the strongest commitment and obligation with respect to the protection afforded to Najrān, a violation of which, whether from the authority or individual, would be subject to punishment. It follows that any wrong committed to the people of the pact would not only against the basic tenets of Islam,<sup>18</sup> as the Muslim must fulfil his word,<sup>19</sup> but also a sin and would be liable for criminal charges in the court of law. It is precisely for this reason that the Caliphs repeatedly renewed the same treaty and upheld its spirit.<sup>20</sup> The same treatment, in terms of commitment and responsibility, would be expected from the subsequent Muslim authorities. It is vital therefore, in any age, to have a good leadership in any community in order to carry out the task, for it is not sufficient to have a good law in the society but what is needed in addition, is a quality of leadership. As for the Muslims, the more pious the man, the better will he lead the community. Therefore, the guarantee in question will be fully upheld by the true Muslim leader since he will be first answerable before God as it is before the men. Any dispute concerning any matter could well be referred to the writings of the

classical jurists, or a new ijtihād is necessary if the matter is new in its nature. Finally, the guarantee of God and the Prophet is immutable and would not by any means subject to temporary desires.

Moreover, in a matter of non-Muslims' belief, Islam tend to follow a rule of "leave it to them whatever they believe."<sup>21</sup> According to the rule, religious freedom is a guaranteed right which will not be violated in any way. Had such not been the case it would have been absurd, hence illegitimate, to conclude the contract of dhimmah. For one of the objectives of the contract is to acknowledge the faith of the dhimmi and not to interfere in matter of their religions.<sup>22</sup> This could be seen from the wording of the above treaty.

#### A. The Basis of Religious Freedom

According to Fārūqī Islam has acknowledged the non-believer on three distinct levels:<sup>23</sup>

1. Humanism. Islam introduced the concept of dīn al-fitrāh (religio naturalis) to express its judgement that all men are endowed at birth by God with a religion that is true, genuine and valid for all time. Without this natural endowment, man would not be man



at all. Islam has based its universal humanism on this basis of religio naturalis. All men are ontologically the creatures of God, and all of them are equal in their natural ability to recognise God and His law,<sup>24</sup> Nobody may even be excused from not knowing God, his Creator, for each and every one has been equipped at birth with the means required for such knowledge.<sup>25</sup> To this end, the Prophet has said: "All men are virtually born Muslims (in the sense of endowed with religio naturalis): It is their parents (tradition, history, culture as opposed to nature) that turn them into Christians and Jews.<sup>26</sup> On this level of nature, Islam holds the believer and non-believer as equal partakers of the religion of God;<sup>27</sup>

2. Universal Revelation. Islam holds that "there is no people but that God had sent them a prophet or warner"; and that "no prophet was sent but to convey the same divine message, namely to teach that God is God and that man ought to serve Him."<sup>28</sup>

In history, every people has been sent a messenger to teach them in their own language so that he might make (the message) clear for them."<sup>29</sup> Every messenger conveyed and made understood identically one and the same message from God whose essence is the recognition of Him as God, i.e. the Creator, Lord, Master and Judge, and the service of Him through adoration and

obedience.<sup>30</sup> All men, therefore, are recognised as possessors of divine revelations, each fitting its context of history and language, but all identical in their essential religious context. Hence, Muslims and non-Muslims are equal in their having once been objects of divine communications;<sup>31</sup> and

3. Islam identified itself with much of the historical revelation of Judaism and Christianity. It acknowledges the prophets of the two religions as genuine prophets of God, and accepted them as Islam's own. It taught its adherents to honour their names and memories. With its acceptance of the Jewish prophets and of Jesus Christ, it reduced every difference between itself and these religions to a domestic variation, which may be due to human understanding, rather than to God or the religion of God. It thus narrowed the gap between the Muslims and the adherents of the two religions.<sup>32</sup>

In Islam, therefore, far from being condemned a priori as enemy and object of divine doom, the non-believer is rehabilitated as God's creature endowed with natural religion, historical revelation identical with Islam's, and if he is a Jew or a Christian, as possessor of the same tradition of revelation as the Muslim.<sup>33</sup>

The Muslim is required to begin by assuming that any Jew and Christian adheres to the same faith as that of Islam on all the three levels mentioned above.<sup>34</sup> On this basis the Qur'ān invites them as follows:

Say O People of the Book! Let us now rally together, around a noble principle common to both of us, viz. that we shall serve (worship) none but God; that we shall associate naught with Him, and shall not take one another as Lords beside God. And if they turn away, then say: Bear witness that we are they who have surrendered (unto Him).<sup>35</sup>

For the same context the Qur'ān says:

Lo! those who believe (the Muslims), and those who are Jews and Christians, and Sabeans - whoever believeth in God and in the Day of Judgement and do righteous deeds, shall have their reward with God. They shall have no cause for fear, nor for grief.<sup>36</sup>

The idea of "salvation" is here made conditional upon three elements only, namely, believe in God, believe in the Day of Judgement, and righteous deed in life.<sup>37</sup>

On the religious plane, it grants every non-Muslim in the world a double religious privilege and religious dignity by virtue of his sharing of natural religion and divine revelation in history. If he happens to be a Jew or a Christian, he is granted a third privilege and dignity, that he is sharing in the tradition of Islam itself. This third privilege



granted by God in the Qur'ān to the Jews, Christians and Sabeans was extended by the Muslims to other adherents of religions such as the Zoroastrians, Hindus, Buddhists and others as they come into contact with them.<sup>38</sup> All three religious privileges, therefore, Islam grants today to adherents of all the religions of the world.<sup>39</sup>

## B. Places of Worship

Religious freedom will not be completed unless it is accompanied with the freedom to exercise it. For this reason it needs places of worships for each particular group of religion in order to express their beliefs in their respective form of worships. For religion is not just an act of belief (in the heart) but it demands manifestation and action. It remains for us to see how far Islam tolerates non-Muslims with respect to their places of worship and to what extent can non-Muslims demonstrate their liturgical, ceremonial as well as spiritual activities outside their places of worship.

Generally speaking, Islam protects, in addition to life and property, the places of worship of non-Muslims, it also allows them to observe their religious ceremonies and freedom of worship.<sup>40</sup> This can be seen from the Qur'ān, the sunnah and the practice of the Prophet's Companions.

The Qur'ān says:

To those against whom war is made, permission is given (to fight), because they are wronged- and verily, God is Most Powerful for their aid- (they are) those who have been expelled from their homes in defiance of right, -(for no cause) except that they say, 'Our Lord is God'. Did not God check one set of people by means of another, there surely would have been pulled down monasteries, churches, synagogues, and mosques in which the name of God is (mentioned) in abundance measure.<sup>41</sup>

The Qur'ān patently guarantees the freedom of worship and it even asks the Muslims not to abuse the idols which the idol-worshippers used to worship, let alone the rites of worship of Jews and Christians. It follows that Islam not only wants to tolerate but indeed to protect and defend the places of worship of all religions.

As for the Tradition, we have pointed out earlier the treaty concluded by the Prophet with the Najrān.<sup>42</sup> In addition, a brief survey of the treaty made by 'Umar I with the Patriarch of Jerusalem will evidently support the case in point. It reads:

This is the protection which the servant of God, 'Umar ibn al-Khaṭṭāb, the Commander of the believers, extends to the people of Aelia.

He guarantees for them the safety of their persons, property, churches, crosses, and of their entire community. Their churches are not to be occupied, demolished, or damaged, nor are their crosses or anything belonging to them to be touched. They will not be forced to abandon their religion, nor will they be harmed. None of the Jews will leave with them in Aelia.<sup>43</sup>

With regards the opinions of the jurists, the cities and towns of the Muslims can be classified, in terms of its inhabitants, into three categories:<sup>44</sup>

1. The cities built or inhabited (maṣṣarah) by the Muslims such as Kūfah, Baṣrah, Baghdād, Cairo and the like. In these cities the building of places of worship for non-Muslims will not be permitted since the land has become the property of the Muslims. The



argument was that to build such places in dār al-Islam is a form of ma'siah (prohibited act hence a sin) something that should be avoided to happen. Should the imām conclude the agreement to that effect the agreement is invalid and voidable.<sup>45</sup> The Prophet is reported to have said: "There is neither castration nor church in Islam."<sup>46</sup> Abū Yuṣuf said that when Ibn 'Abbās was asked on the same matter he replied: "In any city inhabited by the Arabs (Muslims) it is not possible for the dhimmīs to build their places of worship, nor sell wine, nor rear pigs, nor ring bells. However, any city inhabited by non-Arabs but that God has opened it for the Muslims, the dhimmī shall have anything in accordance with the treaty. The Muslims must fulfil it and must not overburden them."<sup>47</sup> Perhaps, it is this saying of Ibn 'Abbās that led the jurists conclude that if such a building was there from time immemorial or before the Muslims settled down, it would be left intact. For the building might have been built in the non-Muslims village but it has become part of the city because of the urbanization.<sup>48</sup>

Can the imām conclude the agreement of dhimmah leaving the existing places of worship in the hands of non-Muslims? The jurists are split over the issue. Some of them say it should not be left to non-Muslims. For in so doing, it will deprive the right of possession for the Muslims since the title to the land

is theirs. Some other jurists say there is no harm if there is justification and interest for that as the Prophet did in the case of Khaybar and the practices of the Four Guided Caliphs.<sup>49</sup> However, if the non-Muslims breach the contract then it is legitimate for the Muslims to confiscate the building whether it is from sulh or 'ānwatan. This is because, in theory, the contract breaker is worst than ḥarbī just as the case of apostate is considered as worse than the unbeliever.<sup>51</sup>

On the other hand, Zaydī jurists held that the imām may grant permission for the non-Muslims to build their places of worship if there is an interest for that.<sup>52</sup> It can be concluded therefore that in the cities and towns of Muslims the places of worship of non-Muslims are in three conditions:

- a. Those that shall remain intact;
- b. Those that shall be demolished because of being newly built; and
- c. Those that are under the scrutiny of the Muslim authority according to the rule of interest (maṣlahah).<sup>53</sup>

2. The cities built and inhabited by non-Muslims but were later conquered by the Muslims (by force). In this case, it is also, as in the first category, not allowed for non-Muslims to build any place of worship. For, the whole territory has become the property of

the Muslims.<sup>54</sup> As for the existing places of worship prior to the conquest of the Muslims, there are two opinions reported from the jurists. The first view says that they must be demolished and it is prohibited (ḥarām) to let them remain, for the land has become the property of the Muslims. Therefore, it is not proper to have ~~non-Muslim features~~ in Muslim areas. This is the view preferred by some Ḥanbalī jurists.<sup>55</sup>

The other view however says that it could be left as it is. They rely on the opinion of Ibn ‘Abbās quoted above. It was also the practice of the Prophet in the case of Khaybar where he left the places of worship belongs to non-Muslims there as they were. It is also contended that the Companions of the Prophet conquered so many places by force but there is no single report to suggest that they pulled down the places of worship of the conquered people.<sup>56</sup> The fact of the presence of the places of worship in those conquered territories, up to the present time, is a clear evidence to the case in point. It is undeniable that those places were built before the conquest. Moreover, it was reported that ‘Umar II wrote to his governors not to demolish synagogues, churches and fire temples (for the Magians).<sup>57</sup>

To sum up we can say that it would be better to leave the matter to the iṭtihād of <sup>the</sup> imām in accordance



with the rule of maṣlahah. At any rate, if he decides to leave the building as it is, hence the non-Muslims would enjoy using it. But it should be recalled that the ownership of land and its properties still belongs to the Muslims since it was acquired by force.<sup>58</sup> This is also the view of Ibn al-Qāsim, a Mālikī jurist, who says that the non-Muslim could build a place of worship with the permission of imām.<sup>59</sup>

3. Any territory which came under the peaceful agreement with the Muslims. This category is of two kind:

a. That which the agreement stipulates that the land remains with its previous owners but they have to pay kharāj for it. In this category, there is no prohibition to build a place of worship for non-Muslims. For the land is theirs. This is what the Prophet had done with the Najrān.<sup>60</sup>

b. That which the agreement stipulates that the land belongs to the Muslims in addition to paying jizyah. In this category, the question of places of worship is determined in the agreement. If it is permitted to build will include restoration. For to prevent restoration would eventually lead to the state of ruinous condition which is the same as demolishing.<sup>61</sup>

With regard<sup>to</sup> the places of worship in the villages and areas which are not considered to be the city of

the Muslims most jurists incline to permit the building of such places especially in the area where the non-Muslim population outnumbered that of the Muslims.<sup>62</sup> This is also true with respect to the religious ceremonies. But in the Muslim cities and predominantly Muslim areas, some jurists hesitate to permit non-Muslims to expose their ceremonies, crosses, or other religious objects for fear of Muslim sentiment which could lead to sedition and disorder.<sup>63</sup>

However, in his covenant with the people of 'Ānāt, Khālīd b. al-Walīd wrote: "Their place of worship and churches will not be demolished. They are allowed to ring their bells at any time of the day and night, except during the Muslim prayer times. They are allowed to bear their crosses in their festivals."<sup>64</sup> The same provision was also concluded by Khālīd with the people of Qarqisiyyā'.<sup>65</sup> According to Abū Yūsuf all the Four Guided Caliphs had not revoked these covenants and its provisions.<sup>66</sup>

With all these evidences coupled with the verse quoted above and the treatment of the Prophet to the Najrān and the like, we fail to understand when Bat Ye'or makes a statement that "dhimmī places of worship were not considered inviolable. They could be ransacked, burned or demolished as acts of reprisal against the community."<sup>67</sup> On another occasion the author plainly says that the ringing of bells, the

public exhibition of crosses and other religious objects were all prohibited.<sup>68</sup> This sort of statement without giving proper historical evidence is not only misleading but also creates misunderstanding among the adherents of the revealed religions.

Furthermore, in Egypt, in the first century of the Hijrah, several churches were constructed. For example, the "Mar Marqas" church of Alexandria was built between 39-56 A.H.<sup>69</sup> When 'Abd al-'Azīz b. Marwān established the city of Helwān, near Cairo, he allowed the Christians to build a church as well as to establish two monasteries for some bishops.<sup>70</sup>

We can conclude that the building of places of worship for non-Muslims in the Muslim cities and in the conquered territories is subject to the approval of imām in accordance with the rule of maṣlahah. This has been the opinions of <sup>the</sup> Zaydī school and Ibn al-Qāsim, a Mālikī jurist.<sup>71</sup> It is to be observed that since Islam acknowledges the freedom of religion, it follows that the freedom to exercise it should also be guaranteed as well. This means that the non-Muslims should have a place for the acts of worship, festivals, celebrations and other religious activities. However, the observance of such activities should not be carried out at the expense of public order, or religious or racial disorder.<sup>72</sup>



## II. Politics.

It should be recalled at the outset that in the Islamic state, every spectrum of human activities should be determined by its ideology. Therefore, political rights granted to all its citizens should come within the framework underlying the state's ideology. This is also true with respect to other spheres of human activities whether social, economic, cultural or even in the works of art and "culture" (except those specifically for the non-Muslims).<sup>1</sup> Hence, any right or liberties granted by the state should be construed under such framework.

As for the political rights of non-Muslims, generally speaking, the jurists accepted the established principle that "the dhimmis have the same rights as us and the same obligation as us."<sup>2</sup> It follows that, as a rule, Islam recognizes no difference between Muslim and non-Muslim subjects in temporal matters. However, as in <sup>the</sup> modern concept of state and government, the Islamic state would reserve some rights and posts to those who share its ideology. For the state, any state, is free to regulate its internal laws in accordance with its own values and weltanschauung.<sup>3</sup> In this section, we shall confine <sup>ourselves</sup> to <sup>an</sup> <sup>kind of</sup> ~~examination~~ two important issues, i.e. holding public office or government services and participation

directly or indirectly in the establishment of government.

A. Holding Public Office.

According to the Islamic point of view, holding public office is not an individual right but is rather a responsibility which the state assigns to an individual if he is fit for it.<sup>4</sup> Hence, it is a trust (amānah) rather than a privilege, which must be carried out to the best of one's ability, if one is entrusted to any post, and one would be answerable to God, no matter whether or not one is faithful in the course of discharging his job.<sup>5</sup> This position is supported by the Tradition narrated by Abū Mūsā who said: "Two of my cousins and I came to the Prophet. One of them said: 'O Prophet of God, appoint us rulers to some lands that God has entrusted to you.' The other man said the same to the Prophet. The Prophet said: 'By God! we do not appoint for this position any one who asks or is covetous for it!'" <sup>6</sup> Ibn Taymiyyah reports the same Tradition with different wording.<sup>7</sup> It was the same response from the Prophet when at one time Abū Dharr al-Ghiffārī, a Companion, approached him for the same purpose. The Prophet advised him that authority is a trust. It will be doom and regretful on the Day of Judgement except for those who carry it justly.<sup>8</sup> All these Traditions clearly point out that

holding public offices is not an individual right or privilege. On the contrary, the appointment is a trust which will be entrusted to some individuals that the imām, or the state, sees fit to carry the job. The criterion for the selection to the post therefore is al-aṣlah (the most suitable person) for any particular job.<sup>9</sup> If there is none qualified then al-amthal fa amthal (from the best to the less good).<sup>10</sup> In this respect God says: "Lo! God commandeth you that ye restore trusts to their owners, and if ye judge between mankind that ye judge justly."<sup>11</sup>

Since the Islamic state is an ideological state, it is naturally expected that the state will restrict some positions for those who uphold the state's ideology, i.e. Muslims, such as the post of the Caliph or imām,<sup>12</sup> the Commander of jihād,<sup>13</sup> the judges (among the Muslims), zakāt collectors, and some policy-making posts.<sup>14</sup> For some of these posts are purely religious in nature. Ibn Khaldūn says that the post of the Caliph is to succeed the Prophet in order to safeguard religion and to discharge worldly affairs.<sup>15</sup>

The leadership of the army, in Islam, is not a civil or secular post. It is a kind of worship. In fact, Islam regards jihād as one of the highest act of worships (ʿibādāt).<sup>16</sup> The same applies to the Islamic judiciary system. For it is unreasonable to



expect a non-Muslim to deliver a judgement in which he does not believe. The same is true with the positions of zakāt collectors and officials entrusted with other posts of a religious nature.<sup>17</sup> It is for this reason that these posts are to be entrusted to the Muslims as we have seen throughout the Muslims' history. Furthermore, the Head of the Islamic state is bound by law to run the government and its machinery in accordance with the Sharī'ah. It is inconceivable therefore for a non-Muslim to take office and execute policies which he does not believe in.

Other than those positions, the non-Muslims are fully eligible and free to participate in the administration of their government. This position is supported by the Qur'ān and the Tradition. The Qur'ān says:

O ye who believe! take not for intimates others than your own folk, who would spare no pains to ruin you; they love to hamper you. Hatred is revealed by (the utterance of) their mouths, but that which their breasts hide is greater. We have made plain for you the revelations if ye will understand.<sup>18</sup>

According to Tabarī, this verse was revealed to the people who have the treaty with the Prophet with whom intimacy was not prohibited. However, <sup>with</sup> those who clearly demonstrated their enmity to the Muslims, intimacy is strictly prohibited.<sup>19</sup> This means that the dhimmīs who do not show hostility to the Islamic state could very well be appointed to the public

offices, especially experts, professionals and the like.<sup>20</sup>

As for the Tradition there are abundance evidences to demonstrate that the Prophet appointed non-Muslims during the early stage of Islam. To mention a few, the first ambassador of Islam, to defend the Muslims before the Negus of Abyssinia against extradition demanded by the Quraysh,<sup>21</sup> was 'Amr b. Umayyah al-Damrī, who belonged to one of the allied tribes of Medina and had not yet embraced Islam.<sup>22</sup> In year 6 A.H when the Prophet and his Companions had camped at Dhū al-Ḥulayfah on their way to perform ʿumrah (lesser pilgrimage as distinct from the hajj or greater pilgrimage), the Prophet sent a man from Banū Khuzā'ah, who was not a Muslim,<sup>23</sup> to collect information on Quraysh's movement.<sup>24</sup> Earlier, in the Medīnah Charter the Prophet made a responsibility of defence to Muslims and non-Muslims alike. It provides that each must help the other against anyone who attacks the people of this document. They must seek mutual advice and consultation. The Jews must pay with the believers so long as war lasts.<sup>25</sup> All these evidences clearly indicate that the Prophet had appointed non-Muslims in the affairs of state and the community. This has led the jurists to conclude that the dhimmī can be appointed, al-Māwardī has maintained, to such posts as the wazīr al-tanfīdh<sup>26</sup>

(the executive minister) who discharges and executes the decision of imām as well as the policy of the government.<sup>27</sup> If a classical jurist like Māwardī, who died in 450 A.H., approved such a position for dhimmī in his days, where the Muslims were at the peak of their power and civilization, it seems clear that the dhimmī should have more opportunity in the present circumstances, provided that they meet the requirements for each post.

We have thus seen that the Qur'ān and the sunnah sanction the appointment of dhimmī, to hold public offices in the Islamic state. We can now turn to the practice of the Muslims throughout the history to throw more light on the subject for deductive purposes and its applicability in our times.

There are innumerable cases throughout the Muslim history when non-Muslims have occupied important posts in the Islamic state. These cover all aspects of the state's machinery ranging from working in the office of the Caliph to servicing people at large.

According to Balādhurī many officials in the administration (diwān) of 'Abd al-Malik b. Marwān were of Byzantine origin and were not Muslims. For it has become an established convention that both Umāwī and 'Abbāsī Caliphs retained the officials employed by the Byzantine and Persian authorities to continue running the affairs of the state uninterrupted.<sup>28</sup> It was for



same reason, perhaps, that 'Umar I left thousands of non-Muslims in the revenue, finance and other departments undisturbed in posts of trust and responsibility.<sup>29</sup> He went as far as to invite a Greek from Syria and entrust him with the finance department in Medina.<sup>30</sup> It was not until the year 81 A.H. that 'Abd al-Malik b. Marwān ordered the language of the office work in these departments to be transferred from Greek and Persian into Arabic.<sup>31</sup>

From these reports, we can see that if the languages used in these departments were not in Arabic so the officials as well as the employees were likely to have been non-Muslims. Moreover, Arnold has recorded many cases of Christians and Jews appointed by the Caliphs as counsellors to the Caliph, state secretariats, and Public Treasury (Bayt al-Māl).<sup>32</sup> Nasr ibn Hārūn, for instance, became the (Prime) Minister<sup>33</sup> of 'Aḡud al-Dawlah (949-982), of the Buwayhid Dynasty of Persia; he was a Christian, and many Churches and monasteries were built in his time.<sup>34</sup> In 380 A.H. al-'Azīz, the Caliph of Egypt, appointed 'Isā b. Nestorius as minister (wazīr) and Manasseh, a Jew, as his deputy in Syria.<sup>35</sup> It was reported that both favoured the Christians and the Jews respectively. Later when a complaint was made, they were removed.<sup>36</sup> Abū Mūsā al-Ash'arī had a Christian secretary, and it was reported that Sarjūn,

a Christian had been appointed first by Mu'āwiyah as secretary to Caliph.<sup>37</sup> In addition, there were several cases that Christians were appointed as envoys, ambassadors especially to Christian governments.<sup>38</sup> Finally, the Ottoman government, the recent Islamic state, did appoint non-Muslims to several posts as did its predecessors and more importantly, it appointed most of its envoys and ambassadors to foreign powers from among Christians.<sup>39</sup> Nevertheless, there were reports that some Caliphs tried to exclude non-Muslims from public offices. However, Tritton has emphatically pointed out that it was seldom that no non-Muslims were to be found in government services, for if one Caliph, for one reason or another, dismissed them, another Caliph would eventually reappointed them, though not necessarily to the same posts.<sup>40</sup>

Those are but some evidences to show that non-Muslims have been appointed in various posts of the Islamic state throughout Muslim history. Indeed, they have participated actively in the administration as well as contributed no less than the Muslims to the advancement of the Islamic state. It is clear therefore, that difference of religion was not an impediment on non-Muslims to be appointed for public offices in the Islamic state. Their appointment, except in some posts, has been sanctioned by the

Qur'ān and the Sunnah, as well as the practice of the Muslims. Those are strong evidences or rather precedents which can be followed by the subsequent Muslim authorities.

1. The Islamic state is essentially an ideological state<sup>41</sup> which is based and established in order to carry out the implementation of Islamic law and its system within its territorial jurisdiction as well as to spread Islam outside its territory by lawful means. This is the objective of the Islamic state.<sup>42</sup> For God says: "Those who, if we give them power in the land, establish worship and pay the poor-due and enjoin good and forbid evil. And God's is the sequel of events."<sup>43</sup> As such, it is not exaggerating to state that the responsibility to run the state should rest primarily with those who believe in its ideology, system and objective therein. As for those who do not believe in the state's ideology, they can participate or cooperate, provided that they fulfil the necessary requirements of efficiency, trust and loyalty to the state.<sup>44</sup> However, it should not be surprising, in this case, if the state would exclude all non-Muslims from public offices for reason of not upholding state's ideology and its objective. But that



unilateral act, would undoubtedly be repugnant to the very teaching of Islam where it directs the state to open its doors to non-Muslim subjects in the field of administration. This is the highest degrees of tolerance which Islam affords to people of different faiths.<sup>45</sup>

## B. Election.

It should be borne in mind that the ideas of parliament, election and separation of powers, among the executive, judiciary and legislative, is a product of the Western Democratic system which is not necessarily in harmony with the Islamic concept of state and government.<sup>47</sup> Hence, election is a modern concept which should be viewed in accordance with Islamic perspective.<sup>48</sup> In Islam, however, the Qur'ān suggested that the affairs of the state should be decided through the process of mutual consultation (shūrā) so that all the policies would be in line with the Islamic principles. In accordance with the Qur'ānic statement:

"And those who answer the call of their Lord and establish worship (al-ṣalāt), and whose affairs are a matter of counsel, and who spent of what we have bestowed on them."<sup>49</sup>

We have seen that in the Islamic state a non-Muslim could not be elected as Head of State nor could he be appointed to be a member of shūrā in the strict sense of the term.<sup>50</sup> For, according to the jurists the requirements for the elector of the imām is identical to the requirements to be an imām itself namely, he must be a Muslim.<sup>51</sup> This means that the right to choose the imām belongs exclusively to the Muslims. There is no evidence to suggest that the dhimmī had ever participated in the election of the Four Guided

Caliphs nor do we encounter any report that the dhimmī had demanded such a right. This has led to the conclusion that the right to choose the imām was exclusively held by the Muslims.<sup>52</sup>

However, some leading contemporary Muslim authority held that non-Muslims may participate in parliamentary election both by voting and membership of parliament in today's context which is considerably different from that of shūrā in its conceptual sense. Such a parliament would have a legislative power which should be subordinated to the binding texts of Islamic Law in which non-Muslims do not believe. This problem could be resolved by stipulating in the constitution that it would be ultra vires of the parliament to legislate any law which is repugnant to the Qur'ān and the sunnah.<sup>54</sup> Perhaps this view could be justified if we look at some provisions laid down by the Prophet in Medīnah's charter. For instance, "There shall always be a mutual council and advice (between Muslim and Jewish subjects). There shall be a joint responsibility for defence including its expenses."<sup>55</sup> It is clear from these provisions that seeking mutual advice and consultation is recommended between the contracting parties (Muslims and non-Muslims). The act of consultation is hardly to occur without giving the equal opportunity or the equal right to access to the central authority which is, in this case, the Prophet



himself.<sup>56</sup> It is immaterial in Islam for subsequent application, whether it is a parliament or any other similar institution, to be set up in accordance with the consensus of the parties concerned, so long as the spirit of consultation and advice is observed.<sup>57</sup>

Nonetheless, with regard to the election of the President or rather Prime Minister, as chief executive officer, in the modern state, whose prototype has been followed by many contemporary Muslim countries, can non-Muslims participate in that election? The answer appears to be positive.<sup>58</sup> For the President is now no longer purely religious in nature (ṣibghah dīniyyah) as it used to be. It is not the office of the Caliph though it does seem to a lesser extent, as discussed by the jurists.<sup>59</sup> Therefore, there should be no exclusion of non-Muslims to partake in the election of the President or Prime Minister as was in the case of the election of the Caliph because of its different nature and function, for the non-Muslim is perfectly eligible to participate in the worldly affairs of the state.<sup>60</sup>

So far we have discussed two fundamental issues relating to dhimmī's political right, i.e. holding public office and their representation. Something should be said here on the freedom of opinion and related subjects.<sup>61</sup> Though Islam recognises it as inherent right for every individual it is not proper,

hence unlawful for non-Muslims to attack Islam, as a religion, and the Prophet under the pretext of freedom of opinion,<sup>62</sup> for such an attack would be considered as against the state itself. Other than these sensitive areas the non-Muslims can discuss almost all subjects and even criticize the government and its policies including the Head of the state so long as it is permitted by law with the same limitations as are imposed on all Muslims. It may not be exaggeration to conclude that all principles of good morals and human dignity are equally applicable to both non-Muslim and Muslim subjects of the Islamic state. This constitutes the ethics of the freedom of opinion in Islam.

### III. Education

Education in Islam is a state matter. The state must provide a proper education to all its citizen, Muslims and non-Muslims alike. the Qur'ān frequently emphasises the need for education. For example,

And the believers should not all go out to fight. Of every troop of them, a party only should go forth, that they (who are left behind) may gain sound knowledge in religion, and that they may warn their folk when they return to them, so that they may beware.<sup>1</sup>

Thus, intellectual activities, in all branches of knowledge, was recommended by the Qur'ān from the early stage of Islam. This is supported by the report that the Prophet freed the Badr prisoners of war if

they would teach the Muslims to read and write.<sup>2</sup> The Qur'ān itself praises, on many occasions, the learned and their superiority over unlearned both in this world and the Hereafter.<sup>3</sup>

Can non-Muslims conduct their own separate education? It appears that there are two levels of education involved namely, religions as well as national.

A. As for religious education, the non-Muslims would have the liberty to educate their children in accordance with their own faiths.<sup>4</sup> This liberty stems from the general principle of Islamic tolerance towards the dhimmī's religions. It is a part of freedom of religion. For the freedom of religion would necessarily entail the right to bring up the children in accordance with one's faith. This could be done, for instance, by allowing the non-Muslim children the right to hear a lesson in their religion at the public schools, or the like at the public expense. If the non-Muslims wishes to add more religious education to his children, he certainly can do that in the privacy of his home after school hours or over the weekends.<sup>5</sup> The same could be said with regards to the training, seminars and activities of religious nature. For example, the dhimmī's may organise a conference on Biblical exegesis, systematic theology, Christian ethics, training priests or the like.<sup>6</sup> In the treaty



Najrān, the Prophet had stipulated that the Najranite Christians will appoint their own clergy.<sup>7</sup> This means that non-Muslims can have the exclusive right to the affairs of church and religion.

It is significant to mention here that children of the Muslim minorities living in non-Muslim countries should be likewise, entitled to receive Islamic instruction at the public expense while other children are receiving instruction in their religion.<sup>8</sup>

B. Other than religious education the non-Muslims would be expected to accept the same system of education as applies to the whole nation.<sup>9</sup> This would mean that there appear to be no separate school for non-Muslims community unless such a school conforms in curricula and general spirit to the public schools.<sup>10</sup> Hence, a dual educational system is hardly accepted in the Islamic state, for the demands of national integration, comprehend the state philosophy and aspiration, do not permit any system contributing to fragmentation or dissolution of the unity of the state.<sup>11</sup> This policy would be put forward in order to create one uniform educational system hence one nation for all its citizens. In so doing, due regard to the heterogeneous religions, customs, languages of non-Muslims is maintained so as not to undermine them. To this end, the non-Muslim may not object to his children, receiving a lesson in Islam, as a subject,

perhaps its basic teachings, in the public schools because in so doing, they could understand the ideology of the state and thus fulfilling a requirement of political and national integration and patriotism.<sup>12</sup> This is equally true with the children of the Muslim minorities living in non-Muslim countries where they have to take a lesson hence understand the system of laws, state and government of the country where they reside.<sup>13</sup>

With regards to the languages, custom and other established norms of non-Muslims it is, believed that they can preserve and practice it as they wish. There is no evidence from the texts, the Qur'ān and the sunnah or the practice of the Companions to suggest to the contrary. This is part of the social and cultural autonomy of every community. Even among the Muslims the difference of customs and languages is well preserved unless that particular practice is contrary to Islamic teachings, for it is not the intention of Islam to annihilate a man's culture, language or even ethnic group through a policy of assimilation. All background differences have nothing to do with Islam as long as they do not contradict the teachings of Islam (with the exception of non-Muslims). On the contrary, by letting those elements of differences flourish, the universality of Islam, whereby every race and community can live peacefully

and on the equal footing, though different ideology or religion, will be more apparent. It is a sign of God, the Creator and the Shaper as the Qur'ān says:

O mankind! Lo! We have created you male and female, and have made you nation and tribes that ye may know one another. Lo! the noblest of you, in the sight of God, is the best in conduct. Lo! God is knower, Aware.<sup>14</sup>

It follows therefore that the state which aims at establishing Islamic law as the law of the land must take steps to ensure that education is not only accessible, but also compulsory for every Muslim man and woman. Since it is of the basic tenets of such a state, hence it becomes its duty, education must be free and obligatory for all its subjects, regardless of background differences.

#### IV. Economics<sup>1</sup>

In the field of economic activity, the doors of industry, trade, agriculture and all other professions are open to all, Muslims and non-Muslims alike, for this domain is purely worldly affairs, where religion has only limited role to play. Hence the non-Muslims have always enjoyed unrestricted freedom to perform all the professions. Every man in the Islamic state, therefore, enjoys equal rights in the field of economic enterprise. The Muslims have no special privileges over non-Muslims in this regard.<sup>2</sup> This has



been the position of jurists who hold that the dhimmī enjoys the same rights and opportunities in the field of trade and all business transactions except a transaction involving usury (ribā) where dhimmī should abstain like a Muslim. This is because the Prophet wrote to the Magians of Hajar that either they cease taking interest or face a war from God and His messenger.<sup>3</sup> According to Kāsānī it is the strongest warning that the Prophet had ever despatched to non-Muslims which must reflect the maximum prohibition.<sup>4</sup> The same provision was rendered by the Prophet to the Najrān.<sup>5</sup> The Qur'ān condemns the practice of usury in many places such as:

And of their taking usury when they were forbidden it, and of their devouring people's wealth by false pretences. We have prepared for those of them who disbelieve a painful doom.<sup>6</sup>

In the light of this clear warning, perhaps, that the jurists come to the conclusion that the prohibition of usury is equally applicable both to Muslims and dhimmī for the uniformity of the rule pertaining to mu'āmalāt as mentioned above. The rule has therefore become a public law which takes effect to all parties within its jurisdiction.<sup>7</sup>

As for <sup>the</sup> trade of liquor and pigs, though the dhimmī is allowed to do so for his own consumption, the jurists hold that it is prohibited to run such a business in the Muslim cities (areas) or transport it

into the cities in an open and unrestricted manner for fear of mishandling it. However, the dhimmi may conduct such a business in his areas or in places which are not considered as Muslim areas though the muslims are presence.<sup>8</sup>

Moreover, the dhimmis also have the right to enjoy whether in the forms of entertainment, or in work of arts for their own consumption. In the privacy of their own homes, the dhimmis are entitled to enjoy all kinds of enjoyments as they please. The moment such enjoyment poses a threat to public morals, which is based on the Islamic standards, the Islamic state has the right to intervene and put an end to the activity.<sup>9</sup> This is because the right of the state or public right has superseded the individual right and it is a duty of the state to preserve public morality, peace and order of the ummah. Any right however, no matter where it derives from, is not an absolute right. At times, it must give way to duty or obligation.

At any rate, in the field of economic activity, the non-Muslims, like their Muslim compatriots, can carry on all kinds of trades industry, agriculture and adopt any profession of their choice.<sup>10</sup> They will not be prohibited from any trade or profession which Muslims are permitted to carry on except where there is a religious implication involved.<sup>11</sup> It could be

said that non-Muslims, in fact, enjoy more freedom and will have wider scope in this regard. This can be seen when we take into account the many items which are unlawful for Muslims to trade for <sup>its very nature</sup> while they are lawful for non-Muslims.<sup>12</sup> As a result, non-Muslims, at any epoch, have always contributed more than Muslims in their share of the gross national product.<sup>13</sup> This is in addition to the many professions, although not forbidden to Muslims, were occupied exclusively by non-Muslims such as the exchanging of money, jewelry and pharmaceutical business which were their exclusive domains. This has been the situation in almost all Muslim countries until recent times.<sup>14</sup> Adam Mez concludes:

Legally no calling or profession was closed to the protected subjects. In those lucrative occupations, such as banking, large commercial ventures, linen trade, land-ownership, medical profession, the Christians and Jews were thickly represented and firmly established. They are so arranged among themselves that in Syria, for instance, most of the financiers were Jews and most of the physicians and 'scribes' Christians. Even at Baghdad the head of the Christian community was the Court physician, and the Court banker the head of the Jewish community.<sup>15</sup>

#### V. Social Security

Legally speaking, non-Muslims enjoy the same benefits as the Muslims with respect to facilities and services afforded by the state. The jurists of



different schools are unanimous on this point. The Prophet was reported to have said: "People share in three common things: water, fire, and pasture."<sup>1</sup> This would include, undoubtedly, Muslims and non-Muslims, dhimmī or musta'min so long as he lives in the Islamic state, even though temporarily,<sup>2</sup> for to protect a dhimmī's life and property would inevitably include both in the time of health and sick, young and old, rich and poor etc. But is the dhimmī entitled to the benefit of bayt al-māl (Public Treasury) in his difficult times? All evidences in hand does not suggest to the contrary. This position is supported by both theory and practices of the Muslims. In theory, since the dhimmī is a permanent resident, hence a subject of the Islamic state, he would therefore be entitled to receive all benefits and services afforded by the state to its citizens subject to the same requirements. It is his right to get such a service, and it is a duty upon the state to render it if he is in need.<sup>3</sup> The Qur'ān says:

O ye who believe! Be steadfast witnesses for God in equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to God. Lo! God is informed of what ye do.<sup>4</sup>

In this regard, the Prophet was reported to have said: "Everyone of you is a shepherd and everyone of you is responsible for his subordinate. The imām is

(also) a shepherd and responsible for his subjects."<sup>5</sup> The underlying principle from both the Qur'ān and the Tradition above patently guarantees the equality of all people (Muslims and non-Muslims) with respect to benefits and services afforded by the state, including that from Public Treasury. The Qur'ān also encourages the Muslims to treat the people justly not on account of race or religion. It is clear therefore that the dhimmī is entitled to the support of bayt al-māl in time of need. This position is in complete harmony with the general characteristics of Islam with respect to mercy and beneficence (iḥsān) to all human beings let alone when a man is in need.<sup>6</sup>

Moreover, there are some specific texts and incidents concerned with the issue:

A. It is reported by Abū 'Ubayd from Sa'īd b. al-Musayyab<sup>7</sup> that the Prophet gave ṣadaqah (charity) to the Jews. The practice was continued after the death of the Prophet.<sup>8</sup>

B. In the peace agreement with the people of Ḥīrah, Khālīd b. al-Walīd wrote, inter alia, that if there was any old man incapable of doing any work or a calamity befel him or he was rich and then became a needy, which made him dependent on his co-religionists, he must be exempted from jizyah and he and his dependents must be maintained from the bayt al-māl (of the Muslims) so long as he lives in dār al-

Islam.' This provision, which was concluded in the time of Abū Bakr, had no objection from the Caliph nor from any of the Prophet's Companions. In a legal sense, such a state of affairs constitutes a binding force on all Muslims, hence it is an irrevocable precedent, for the matter has become a consensus of the Companions of the Prophet.

C. Abū 'Ubayd reported that 'Umar II wrote to his official in Baṣrah, 'Adī bin Arṭāṭ, "Look after the affairs of the dhimmīs particularly those who are old, weak, and have no any means of livelihood. They should be given maintenance from bayt al-mal of the Muslims. This is because I heard that 'Umar I had done the same to dhimmīs.<sup>10</sup>

All these reports clearly indicate that the Islamic state is under obligation to support the needy dhimmī. This principle was laid down by the highest authority, after the Qur'ān, of the Islamic law. The incidents above specifically dealt with the dhimmī. Hence there is no room for the Muslim authority not to abide by it. It is but a reflection of social guarantees afforded by the Islamic state to all its citizens.<sup>11</sup> It is clear therefore that the dhimmī has equal right with the Muslims in support and benefit from the Public Treasury of the Islamic state.

However, can the dhimmī claims his portion from



zakāt fund? All the evidence seems to be negative except in special cases. The majority of jurists from different schools, except Zufar, Ibn Sirīn and Zuhri, held that adhimmī is not entitled to a share in the zakāt fund.<sup>12</sup> The jurists rely exclusively on the Tradition reported from Mu'adh b. Jabal that the Prophet said to him: "Impose it (zakāt) on the rich of them (the Muslims) and give it away to the poor of them."<sup>13</sup> According to Ibn Qudāmah: "We do not know of any disagreement among the scholars that the zakāt fund is not to be distributed to the dhimmī. Ibn Mundhir says the consensus among the scholars that we know is that the dhimmī is not entitled to zakāt because of the said Tradition of Mu'adh."<sup>14</sup> Abū Yūsuf concluded that any obligatory ṣadaqah is not, by analogy, to be given to non-Muslims.<sup>15</sup> Abū 'Ubayd reports many Traditions to the same effect and concludes that the practice of the Prophet was that zakāt is not to be given to a dhimmī.<sup>16</sup>

On the contrary, those who held that zakāt could be given to a dhimmī rely on the saying of 'Umar I who after seeing the poor Jew was begging, as reported by Abū Yūsuf, recited the verse: "The alms are only for the poor and the needy...."<sup>17</sup> 'Umar then explained that the poor (fuqarā') are "Muslims" whereas the needy (masākīn) are "People of the Book." Thereafter, 'Umar took the Jew's hand and instructed that he be

given maintenance from bayt al-māl.<sup>18</sup>

But this saying and practice of 'Umar by no means can stand against the above Tradition, for the meaning of the Tradition is absolutely clear which needs no effort for the jurists to have recourse to another means of interpretation. It is therefore, as understood by jurists, the generality of <sup>the</sup> universe has been properly specified by the Tradition of Mu'ādh.<sup>19</sup>

Further, zakāt is a kind of 'ibādah (worship) and constitutes one of the five pillars of Islam which is prescribed only for the Muslims. The dhimmī, therefore, does not contribute to it. It follows that it is the Muslims who should be the recipients of it since the dhimmī could have a support from another means.

It is clear that the dhimmī is not entitled to the zakāt fund as long as the needy Muslims, who deserve it, are there except when there is no Muslim deserves it in which case the dhimmī is fully eligible to the fund. This is because the dhimmī is no doubt, entitled to receive a ṣadaqah (charity).<sup>20</sup> This position is supported by the Tradition reported <sup>by</sup> Abū 'Ubayd which says that the ṣadaqah is to be given to a dhimmī in the absence of the needy Muslims.<sup>21</sup> It was reported also that Ṣafiyyah bt. Ḥuyay, the Prophet's wife, gave her ṣadaqah to her relatives who were Jews.<sup>22</sup> The Qur'ān, on many occasions, speaks to this effect.<sup>23</sup>

On the other hand, the jurists disagree over the distribution of zakāt al-fiṭr (the alms of the breaking of the fast)<sup>24</sup> for the dhimmī. The disagreement arises over the issue whether the recipient should be needy only, or needy and a Muslim.<sup>25</sup> The majority held to the latter view, hence there is no zakāt al-fiṭr for the dhimmī; whereas Abū Ḥanīfah and Muḥammad al-Shaybānī held to the former. This will include the payment of religious expiation (kaffārah) and vows (nudhūr).<sup>26</sup> This view is supported by the report of Abū 'Ubayd who says that some Christian priests were recipients of zakāt al-fiṭr.<sup>27</sup> It is for this reason, perhaps, that some jurists say that a dhimmī should be a priest to be liable to receive zakāt al-fiṭr.<sup>28</sup> Moreover, some jurists contend that if a dhimmī is not entitled to zakāt under the category of poor, he could well be entitled under the category of "those whose heart are to be reconciled" (al-mu'allafati qulūbuhum).<sup>29</sup> This is the view of Mālikī and Zaydī jurists.<sup>30</sup> They held that the apportionment for this category should be left intact in order to keep the dhimmī near to Islam, retain their loyalty to the state and not to side with the enemy.<sup>31</sup>

Finally, we can conclude that in addition to the right to bayt al-māl, the dhimmī, in time of need, could also accept ṣadaqah, with its various forms, so



long as there is no enmity on his part to Islam. As for zakāt, which is obligatory for Muslims, the majority of the jurists held that the dhimmīs not entitled to it except in the absence of needy Muslims.

## CHAPTER SIX

### CONCLUSION

I. The origin and development of the classical concept of dhimmī and its related subject emerged after the revelation of the verse of jizyah (Q., 9:29). Since then, the jurists have begun to formulate its theory to meet the need of socio-political reality. As a result, all socio-legal concepts pertaining to the dhimmī were developed and systematized.

Islamic law regards its ideology (al-ʿaqīdah), not any other peripheral consideration, as a basis to establish its community, the state, and divide mankind. It is on this precept that the jurists divide the world at large into dār al-Islām and dār al-ḥarb, and the Qur'ān divides mankind into Muslims and non-Muslims.

Dār al-Islām is the territory where the authority is in the hand of the Muslims, where Islamic law should be fully enforced, and where all the institutions therein should be in conformity with the general rule of Islamic teachings. The jurists also held that all Muslim territories, or to use a modern term, Muslim countries, though under different Muslim rulers, are considered as one dār which should be governed by one uniform constitution. Those who have

concluded the permanent contract of dhimmah (pledge of allegiance) with dār al-Islām are called dhimmīs. They pledge loyalty to the state, pay taxes, and in return, the state protects their security, property and religion.

On the other hand, dār al-ḥarb is a territory inhabited and controlled by non-Muslims. There is no relationship or bilateral agreement between the two. There are cases where the status of the dār could be transformed. The citizens of dār al-ḥarb are called ḥarbīs. If there is an agreement with dār al-Islām the territory would be called dār al-‘ahd, hence, its citizens are called al-mu‘āhid. The majority of the jurists reject this category, as a separate entity, but would include it under dār al-Islām. However, this theory provides a proper basis for international relation between Muslim and non-Muslim countries. Therefore, the basis of relationship among the states, as among human beings, is peace not aggression.

II. There are four obligations of the dhimmī towards the Islamic state. They should pay jizyah, kharāj, ‘ushr and observe some aspects of Islamic law. As regards jizyah it is a tax for the protection of the dhimmī because the dhimmī is not required to defend dār al-Islām, and if the state could not protect the dhimmī, the tax will not be collected. The same rule applies if the dhimmī joins the Muslim



army. It is not a poll-tax nor a punishment for infidelity as alleged by some quarters. For The Qur'ān says that "there is no compulsion in Islam", and not every dhimmī required to pay jizyah but only the able bodied man.

Furthermore, it is not a fundamental law. The case of Banū Taghlib and the agreement with the Nubians serve as modus operandi for the concept. The same treatment would be accorded to any group of non-Muslims who have the same criteria like Banū Taghlib. There is no jizyah collected from non-Muslims in contemporary Muslim countries because the governments have made a military service compulsory for all its citizens. This is in addition to one uniform national tax which is equally imposed on all citizens.

Kharāj, like jizyah, was not introduced by the Muslims. The tax had been imposed by many sovereigns on their subjects in many forms. Kharāj is conquered land which the imām decided not to divide among the warriors but retained in the hands of the original owners for cultivation. In return, the tenant has to pay kharāj (tax) for the sum agreed upon to the Muslim authority. The term kharāj itself is Arabic as well as Islamic.

While jizyah is the Qur'ānic injunction, kharāj was the ittihād of 'Umar I. Public interests and the consensus of the Companions were the legal basis of

the decision to impose kharāj. Kharāj is imposed on kharāj-land whether the tenant is a Muslim or a non-Muslim and whether the land is actually utilized or not. Its revenue is to be expended for the interest of the Muslim community according to the ijtihād of imām.

Ushr or tithe is a trade tax which is levied only when the goods are transported from one region to the other within the Islamic state. The rate is a half tenth for the dhimmī, a tenth for musta'min, and a quarter of a tenth for Muslims. However, the goods must reach a specific amount in order to be liable for taxation. Ushr, as kharāj, was the ijtihād of 'Umar I. The Islamic state applies the rule of reciprocal treatment in charging it on the musta'min traders. Its legal basis were the practice of 'Umar I and the consensus of the Companions of the Prophet. At times, 'Umar I reduced the rate to half if the musta'min carried the food-stuff to Medina in order to encourage the merchants to bring more food to Medina. Therefore, the rate of ushr could be fixed in accordance with the needs and the interests of the state.

In addition, the non-Muslim is required to observe some aspects of Islamic law except in matters of beliefs and personal laws. The maxim says: "Leave them with whatever they believe." Hence, the dhimmī enjoys a social and religious autonomy. Nevertheless, if a dhimmī takes his case to the Muslim court, the judge

will decide the case in accordance with Islamic law. In the law of criminal, civil, contract and the like the dhimmī will be treated like the Muslims.

The non-Muslim also has to respect the Islamic state and its ideology. It is not proper for them to abuse God, Islam, the Prophet, and the Qur'ān. The non-Muslim also is not allowed to openly indulge in the things prohibited by Islam in the Muslim areas.

III. Tolerance concerns the acts or practices of non-Muslims which are permitted by the Qur'ān and the sunnah and the juristic interpretation thereof. It implies that every individual has the right to belief, the freedom to exercise his religion, and all people are equal before the law. In short, it can be said that the teachings of Islam do not forbid practices that are believed to be lawful by non-Muslims. As the maxim says: "Leave them and what they believe."

IV. Islamic law is universal in character and its scope. It appeals to all mankind. But circumstances necessitated Islamic law being territorial rather than universal. There are three theories in respect of territorial jurisdiction of Islamic Criminal Law.

The first theory held that Islamic law is applicable on Muslim or dhimmī if the crimes committed in dār al-Islām. The same applies to musta'min if the crime related to the rights of human being. But if the crime touches on the rights of God he will not be



punished. However, if the crime is committed outside Islamic territory, Islamic law is not applicable because of lack of jurisdiction. If the crime occurred in the Muslim camp in dār al-ḥarb, it takes the same rule as applies to Islamic territory.

The second theory says that Islamic law should be applied to "all people" and on "all matters" in dār al-Islām. But this theory agrees with the former that Islamic law is not applicable to crime committed by Muslim or dhimmī abroad with two exceptions: (a) it is not permissible for them to conclude a ribā contract (with any party) abroad; and (b) if a Muslim prisoner of war is killed by a Muslim or dhimmī in dār al-ḥarb the first theory says no qisās or diyah on the killer but the second theory says that diyah is still liable on the killer.

The third theory maintains that Islamic law is applicable on all persons for all crimes committed in dār al-Islām or dār al-ḥarb. But not on a ḥarbī who has become a musta'min. There is no effect of difference of domicile in terms of criminal responsibility for a Muslim or dhimmī. It seems that this theory is more relevant to the letter and spirit of Islamic law. For the matter touches on the jurisdiction and sovereignty of the state. Therefore, Islamic law should be applied to all criminal cases committed within its own territory regardless of the

culprit, and over the crimes committed by its own citizens outside its territory.

The contract of a dhimmī who is involved in crimes against the state such as armed robbery, rebellion and the like seems to be unaffected, thus he should be treated and punished like a Muslim.

In a matter of qisās, though the right belongs to the victim's heir, it is agreed that it should be delegated to the state to carry out the execution. However, the right to pardon belongs to every member of the victim's family. A Muslim is liable for qisās if he kills a dhimmī or musta'min in dār al-Islām. For their blood is deemed inviolable by virtue of contract and amān pact. Likewise, a dhimmī or musta'min is liable for qisās if he kills a Muslim, dhimmī, or musta'min. It is immaterial whether the victim is male or female and whether the parties come from the same faith.

In all hudūd punishments such as adultery, theft and the like, a dhimmī and musta'min are liable for ḥadd or ta'zīr as a Muslim, except a ḥadd for liquor.

In the realm of personal law, a Muslim is allowed to marry a non-Muslim woman of kitābiyyāt. But non-Muslims are not allowed to marry Muslim women. With regard to the marriage of non-Muslims to each other, Islamic family law has left complete legal freedom, hence autonomy for non-Muslims provided that no Muslim

is involved or they do not take the case to the Muslim court.

If both husband and wife become Muslim, the bond of marriage continues. But if the wife is a non-marriageable person, they will be separated. If the wife alone becomes a Muslim, or the wife is of non-kitābī while her husband has become Muslim, the jurists are divided over the terms of their separation. It seems that the view of Ḥanafī school is more relevant in this case. The jurists are also split over the case of difference of domicile, followed by the difference of religions between the couple who were legally married. The majority held that the marriage will not be affected unless there is no conversion by the other spouse with the expiry of the waiting period.

In the law of contracts and obligations, a non-Muslim is treated like a Muslim except contracts pertaining to liquor and pigs. It is also true with respect to all dealings related to worldly affairs. This means that everything that is allowable for a Muslim is likewise allowable for a non-Muslim and vice versa. In short, a non-Muslim, in doing business in the Islamic state, has to follow the Islamic law of contract.

V. Generally, the dhimmī's socio-political status can be regarded as the same as a Muslim except in some



cases relating to faith. There is complete religious freedom for non-Muslims. It is a matter of immutable principle rather than a policy. However, the building of places of worship for non-Muslims in the Muslim cities is subject to the approval of imām (authority) in accordance with the rule of maṣlahah.

In the Islamic state, the political rights granted to all its citizens should come within the framework underlying the state's ideology. The jurists say: "The dhimmīs have the same rights as us and the same obligations as us." Therefore, Islam recognises no difference between Muslims and non-Muslims in temporal matters. Since the Islamic state is an ideological state, it is naturally that the state will restrict some positions for those who uphold the state's ideology. Apart from that the non-Muslims are fully eligible and free to participate in the administration of their government. The concept of tolerance is clearly seen here. There are innumerable cases throughout the Muslim history when the non-Muslims have occupied important posts in the Islamic state. Thus, difference of religion was not an impediment on non-Muslims to being appointed to public offices.

The ideas of parliament, election, and separation of powers is a product of the Western Democratic system which is not necessarily in harmony with the Islamic concept of state and government. Thus, non-

Muslims may participate in parliamentary election both by voting and membership of parliament in today's context which is different from that of shurā in its conceptual sense. By the same token, non-Muslims can participate in the election of Prime Minister or the President. For the post is no longer considered as purely religious in nature. It is not the office of the Caliph as perceived by the jurists.

Freedom of opinion should not be construed as absolute. It is not lawful for non-Muslims to attack Islam, its tenets, and the Prophet under the pretext of freedom of opinion. For such an attack would be considered as against the state itself.

Education in Islam is a state matter. The state must provide proper education to all its citizens. As for religious education, the non-Muslims will have the liberty to educate their children in accordance with their own faiths. This appears to be the same case for the children of the Muslim minorities living in non-Muslim countries. Other than religious education, the non-Muslims would be expected to accept the same system of education as applies to the whole nation. This is vital to create one uniform educational system, hence one nation for all its citizens. Thus, the non-Muslim may not object to his children receiving a lesson in Islam, in the public schools because in so doing, they could understand the

ideology of the state.

With regard to the languages, custom, and other established norms of non-Muslims, it is believed that they can preserve and practice it as they wish. There is no evidence from the texts or the practice of the Companions to suggest to the contrary.

In the field of economic activities, its doors are opened equally to Muslims and non-Muslims alike. The rules and regulations are identical except in cases of transactions involving pigs and liquor where the non-Muslims are allowed to do so with some restrictions. As for a transaction involving usury (ribā), the dhimmī should abstain like the Muslims. The dhimmī also have the right to enjoy, entertainments or in the work of arts, provided that it does not pose a threat to public morals. In fact, non-Muslims enjoy more freedom and will have wider scope in this regard.

In social security, non-Muslims enjoy the same benefits as the Muslims with respect to facilities and services afforded by the state. This includes the entitlement to bayt-al-māl, charity and the like. As for zakāt the majority of jurists holds that the dhimmī is not entitled to it except in the absence of the needy Muslims.

To sum up, it can be said that there is no prescribed and emphatic (qatʿī) text pertaining to the rule of treatment of dhimmīs. Thus, it falls under the



domain of ijtihād by the imām in accordance with the rule of maṣlahah which is part of al-siyāsah al-sharʿiyyah.

It can be seen, then, that in all legal aspects of life a dhimmī will enjoy much the same in terms of duties and privileges as a Muslim. The jurists, through the practice of ijtihād based on the Qur'ān and Sunnah, have constructed an Islamic system in which Muslim and non-Muslim can live together in peace, harmony, and security.

LIST OF ABBREVIATIONS

The following is a list of the abbreviations used for the most frequently consulted works:

Ahm,	Aḥmad b. Ḥanbal, <u>al-Musnad</u> .
Arj,	Muḥammad Ṣādiq 'Arjūn, <u>al-Mawsū'ah fī Samāḥah al-Islām</u> .
Arn,	Arnold, <u>The Preaching of Islam</u> .
Asa1,	Muḥammad Asad, <u>The Message of the Qur'ān</u> .
Asa2,	_____, <u>The Principles of State and Government in Islam</u> .
AU,	Abū 'Ubayd, <u>Kitāb al-Amwāl</u> .
Awa,	Mohamed S. El-Awa, <u>Punishment in Islamic Law</u> .
Awd,	'Abd al-Qādir 'Awdah, <u>al-Tashrī' al-Jinā'i al-Islāmī</u> .
AY,	Abū Yūsuf, <u>Kitāb al-Kharāj</u> .
Bad,	Badrān Abū al-'Aynayn Badrān, <u>al-'Alāqāt al-I'timā'iyah bayn al-Muslimīn wa Ghayr al-Muslimīn</u> .
Bal,	Balādhurī, <u>Futūḥ al-Buldān</u> .
Baq,	Muḥammad Fu'ād 'Abd al-Bāqī, <u>al-Lu'lu' wa al-Marjān</u> .
Buk,	Bukhārī, <u>Ṣaḥīḥ</u> .
Daw,	Abū Dā'ūd, <u>Sunan</u> .
Dud,	Mawdūdī, <u>The Islamic law and</u>

Constitution.

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- Frq,      al-Fārūqī, "The Rights of non-Muslims under Islam: Social and Cultural Aspects".
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- Kas,      Kāsānī, Kitāb Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'.
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- Khd,      Majīd Khaddūrī, War and Peace in the Law of Islam.
- Khr,      'Alī Ḥusnī al-Kharbuṭlī, al-Islam wa Ahl al-Dhimmah.



- Lan, Lane, Arabic-English Lexicon.
- Mal1, Mālik b. Anas, al-Mudawwanah al-Kubrā.
- Mal2, \_\_\_\_\_, al-Muwatta'a.
- Man, Ibn Manzūr, Lisān al-‘Arab.
- Maw, al-Māwardī, Aḥkām al-Sultāniyyah.
- Mar, al-Marāghī, al-Tashrī‘ al-Islāmī li  
Ghayr al-Muslimīn.
- Mus, Muslim b. al-Ḥajjāj, Ṣaḥīḥ Muslim.
- Qar1, Yūsuf al-Qaraḍāwī, Fiqh al-Zakāt.
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al-Mujtama‘ al-Islāmī.
- Qay1, Ibn Qayyim, Aḥkām Ahl al-Dhimmah.
- Qay2, \_\_\_\_\_, A‘lām al-Muwaqqi‘īn.
- Qay3, \_\_\_\_\_, al-Turuq al-Hukmiyyah fī al-  
Siyāsah al-Shar‘iyyah.
- Qay4, \_\_\_\_\_, Zād al-Ma‘ād.
- Qud, Ibn Qudāmah, al-Mughnī.
- Q. , The Qur’ān
- Qur. al-Qurṭubī, al-Jāmi‘ li Aḥkām al-Qur’ān.
- Raj, Ibn Rajab al-Ḥanbalī, al-Istikhrāj li  
Aḥkām al-Kharāj.
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- San, Ṣan‘ānī, al-Muṣannaf.
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- Sch, J. Schacht, An Introduction to Islamic law.
- Shb, al-Shāṭibī, al-Muwāfaqāt.
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- Sha3, \_\_\_\_\_, al-Umm.
- Sh1, al-Shīrāzī, Ṭabaqāt al-Fuqahā'.
- Shw, Shawkānī, Nayl al-Awtār.
- Slb, Muhammad Muṣṭaphā Shalabī, Ta'ḥlīl al-Aḥkām.
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- Tay2, \_\_\_\_\_, al-Siyāsah al-Shar'īyyah.
- Tir, al-Tirmidhī, Ṣaḥīḥ al-Tirmidhī bi Sharḥ Ibn al-'Arabī.
- Tri, Tritton, The Caliphs and Their non-Muslim Subjects.
- Wak, Wakī', Akḥbār al-Quḍāt.
- Waq, al-Wāqidī, Kitāb al-Maghāzī.

- Yah, Yahya b. Ādam, Kitāb al-Kharāj.
- Zah, Muḥammad Abū Zahrah, al-Jarīmah wa al-Uqūbah fī al-Fiqh al-Islāmī.
- Zam, Zamakhsharī, al-Kashshāf.
- Zay, Zaydān, Aḥkām al-Dhimmiyyīn wa al-musta'mīnīn fī Dār al-Islām.
- Zur, al-Zurqānī, Sharḥ al-Zurqānī 'alā Muwaṭṭa' al-Imām Mālīk.



NOTESCHAPTER ONE

1. Sha3, IV, pp. 103-04.
2. It also known as dār al-‘adl.
3. Khd, p.170; A. Abel "Dar al-Islam", in EI<sup>2</sup> ; see also Mar, p. 22, and Hughes, A Dictionary of Islam, London, 1885, p.70
4. See, e.g. Q. , 2:256.
5. Yah, trans. Ben Shemesh Leiden, 1958, p.23; Maw, p. 137-38; D.B. Macdonald, "Dār al-Ṣulḥ", in EI<sup>2</sup>, and al-Ghunaimi, The Muslim Conception of International Law and the Western Approach The Hague, 1968, p.157.
6. The terms dhimmī, kharāj, and jizyah will be discussed in details in the following chapters.
7. Maw; p.138.
8. The Founder of the Ḥanafī school of law.
9. Kas, VII, pp.130-31; Maw, p.138; Khd, p.156 and see also D.B. Macdonald and A. Abel, "Dar al-Sulh", in EI<sup>2</sup>.
10. It should be noted here that the term sharī‘ah means not only body of law but also the whole socio-economic institutions prescribed by Islam.
11. The question of sovereignty in the Islamic state has been discussed widely among the Muslim scholars. It is beyond the scope of this work to examine it closely.
12. It should be recalled here that despite the fact that many Muslim countries gained independence after World War II, the legal and socio-political systems have remained unchanged, i.e. colonial systems and secular laws still prevail, hence dār al-fiq.
13. e.g. The Muslim Brotherhood in Egypt, Jamā‘at Islāmī in Pakistan, Pan Malayan Islamic Party, and

Malaysian Youth Movement in Malaysia, etc.

14. See Q., 8: 39, 15-17; 9: 29 and 49: 13.
15. Bal, pp. 93-99.
16. Khd, pp. 170-71; see also A. Abel, "Dār al-Ḥarb" in EI<sup>2</sup> and W. al-Zuhaylī, Athār al-Ḥarb fī al-Fiqh al-Islāmī, Damascus, 1962, pp. 154-8.
17. See, e.g. Q., 9: 41-42, 72-73.
18. It is important to note here that Muslim historians throughout the Muslim history use the term fath (futūḥāt-pl.) meaning opening or victory to indicate the victory of the Muslim army instead of conquering or occupation. This Islamic term, used in the Qur'an on several occasions, is rather different from the Western concept of conquest or subjugation. The implication of the Islamic term is opening up the area to Islam.
19. See note 9 supra.
20. Khālid's letter in AY, pp. 143-45.
21. Q., 16 : 92 and 49 : 13.
22. Maw, p. 5.
23. Al-Ghunaimī, op. cit., p. 184.
24. Q., 49 : 13.
25. Sha3, p. 103-04; Yaḥ, p. 54 ; and Maw, p. 137.
26. The term indicates temporary peace as opposed to ‘aqq al-dhimmah (permanent peace agreement). Some would prefer to call hudnah or musalamah, hence dār al-hudnah.
27. Sha3, op. cit.
28. Al-Armanāzī, al-Shar‘ al-Dawlī fī al-Islām Damascus, 1349 A.H, p. 50.
29. Far, p. 133.
30. Maw, p. 138.
31. AU, p. 182; Bal, p. 71,
32. Bal, p. 234, and Ham2, pp. 530-31
33. Ham2, op. cit.
34. Al-Armanāzī, op. cit., p. 50.

35. Halil Inalcik, "Dār al-‘Ahd" in EI<sup>2</sup>.
36. In Islamic criminal law there is a special rule dealing with rebels. They should be in a considerable number and power to challenge the authority in order to be considered as bughāt.
37. Maw, p. 138.
38. Sar2, IV , p. 8
39. Q., 4 : 90 and 2 : 208.
40. Ibid., 17 : 70.
41. Ibid., 4 : 1 ; 7 : 189 and 49 : 13.
42. Ibid., 5 : 2.
43. Ibid., 41 : 34 ; 7 : 199 and 16 : 126-127.
44. Ibid., 2 : 265 and 10 : 99.
45. Ibid., 2:190 and 194; the Prophet used to repeatedly advice his Commander as follows: Yaḥyā related to me from Mālīk that he had heard that ‘Umar ibn ‘Abd al-‘Azīz wrote to one of his governors, "It has been passed down to us that when the Messenger of Allāh, may Allāh bless him and grant him peace, sent out a raiding party, he would say to them, 'Make your raids in the name of Allāh in the way of Allāh. Fight whoever denies Allāh. Do not steal from the booty, and do not act treacherously. Do not mutilate and do not kill children. 'Say the same to your armies and raiding parties, Allāh willing. Peace be upon you." Mal2, pp. 198-9.
46. Q., 5 : 9 and 57 : 25.
47. Ibid., 2 : 251 and 3 : 110.
48. Ibid., 8 : 61-62 ; 16 : 91-94 and 5 : 1.
49. Ibid., 60 : 8-9.
50. Ish, trans. A. Guillaume, Karachi, 1980, pp. 143-45; also His, I, pp. 277-9.
51. Q., 22:39-40, and 2:217-8.
52. Ish, pp. 212-3 and His, II, pp. 79-80.
53. Q., 2 : 217.



54. Ish, , pp. 433-36; His, III, pp. 103-05.
55. Ish, pp. 450-60.
56. Q., 33: 10-13 and 23-24.
57. Q., 2: 216.
58. 'Abd al-Wahhāb al-Khallāf, al-Siyāsah al-Shar'īyyah Cairo, 1350, pp. 63-7; see also, Muḥammad Abū Zahrah, al-'Alāqāt al-Dawliyyah fī al-Islām Cairo, n.d., pp. 51-2.
59. Q., 64: 2.
60. Ibid., 45: 30-31; 47: 1-3.
61. In the Qur'ān, 34: 28, we read: "We have not sent thee but as a universal (Messenger) to men, giving them glad tidings, and warning them (against sin), but most men understand not."
62. Sar2, I, p. 209 ; see also CL. Cahen, "Dhimma" in EI.<sup>2</sup> al-Dhimma also means a pact for a short or a long term.
63. Bal, p. 45; AU, p. 66.
64. Kas, VII., p. 111.
65. Jaṣ, I, p. 142; cf. Shw, VIII , p. 58.
66. Q., 9: 29.
67. Kas, , p. 111; see also Shw, p. 58.
68. Kas, op. cit.
69. In the case of ḥarbī and the like.
70. Bal, pp. 71-5; and for Banū Taghlib, see, pp. 181-83.
71. Kas, op. cit.
72. Khd, p. 163.
73. Ibid.
74. Azharī, The Theory and Sources of Islamic law for non-Muslims, Decca, 1962, p. 8.
75. Al-Hindī, Kanz al-'Ummāl, IV, Hyderabad, 1950, p. 222; cf., Haj, III, pp. 451-52; and Schacht, The Origins of Muḥammadan Jurisprudence, Oxford, 1979, pp. 174, 181.
76. Kas, VII, p. 110; Khd, p. 163.

- 77. Sar1, X, p. 92.
- 78. Q., 9: 6.
- 79. Khd, pp. 163-64; Zay, pp. 47-8.

NOTESCHAPTER TWOI. JIZYAH

1. It is like fi'lah as you say, jazā fulānun fulānan mā 'alayhi (a person recompensed another for what he owed to him). See Tab2, XIV, p. 199; Man, XIV, p. 147; Lan, I, p. 422.
2. According to Dennett, "Since we are talking in terms of history, not of philology the problem is not what the taxes were called, but what they were." See Daniel C. Dennett, Conversion and the Poll Tax in Early Islam, Cambridge, Mass., 1950, p. 9.
3. For instance, we encounter such phrases as "jizyah on their lands and kharāj on their heads". See e.g., AY, p. 122; Ta2, p. 199.
4. Imā' is the third source of Islamic law after the Qur'ān and ḥadīth (the Tradition of the Prophet).
5. AY, p. 28; AU, pp. 59-62.
6. Q., 9:29.
7. Ta2, p. 200.
8. Bal, p. 67.
9. Ibid., pp. 67-68.
10. AY, p. 125; Bal, p. 163; Qur, VIII, p. 115.
11. AY, p. 125.
12. Literally means from the hand. It has been accepted as being the symbol of power and authority.
13. The term, derived from ṣaghura, or ṣigharu hence, ṣaghār means small, little or low. See Man, IV, pp. 458-59; Lan, II, pp. 1691-92.
14. Ta2, p. 200-63.
15. Zam, II, pp. 262-63.



16. Qur, p. 115.
17. Revealed in Medina and after the migration of the Prophet.
18. Sha3, IV, p. 186.
19. Kas, VII, p. 111.
20. Ta3, II, pp. 151-52.
21. Jurjī Zaydān, Tarīkh al-Tamaddun al-Islāmī, I, Cairo, 1902, pp. 169-70.
22. Ziauddin Aḥmad, "The concept of Jizyah in Early Islam", Islamic Studies. XIV, (1975), 294; cf. Lan, Lex, I, p. 422.
23. CL. Cahen, "Djizyah", in EI<sup>2</sup>.
24. AY, p. 122.
25. Ibid.; but cf. TA1, p. 200.
26. TA2, pp. 199-200; Jas, III, pp. 92-93.
27. Ma2, pp. 132-33; see also Qur, p. 111.
28. Sha3, p. 183; Ta1, p. 200.
29. AY, p. 129; Sha3.
30. Jas, II, p. 328; Qud, VIII, pp. 496-97; Qay1, pp. 90-99; Kha, IV, p. 244. For the Sabeans, see, Q., 2: 62; 5: 72; and 22: 17.
31. Tab1, p. 200; Qur, p. 110.
32. Tab1, pp. 200-02.
33. Ibid.; Qur, p. 110.
34. Tab1, p. 201.
35. Ibid., p. 203.
36. Ibid., p. 201. According to Shāfi'ī anyone who believes in the religion of the People of the Book (any book), or whose ancestors believed in it; or who believes in it even though his ancestors did not (believed in it) before the revelation of al-Furqān (the Qur'ān); and he negates the religion of idolaters before the revelation of al-Furqān, is therefore not an idolater. Thus, the imām should accept the payment of jizyah when he pays in humiliation (i.e. accepting the authority of

Islam) whether he is an Arab or non-Arab. See Sha3, Um, IV, p. 184.

37. Q., 8:39.

38. Tab1, p. 203.

39. He was one of tābi'ī jurists died in Baṣrah in 110/728. See Sh1, pp. 68-9.

40. Tab1, p. 203.

41. Ibid.

42. AY, p. 122; Tab1, p. 204.

43. Mālik and Shāfi'ī say no jizyah on women as well as on male minors. See AY, p. 122; Yah, pp. 73-4; Sha3, p. 185; Tab1, p. 204; and Qur, p. 112.

44. The term muqātalah signifies to fight against each other; mufā'alah to engage in the same action. See Man, XI, p. 549.

45. Haz, VII, pp. 347-48; but cf., Yah, pp. 73-4; and AU, p. 40.

46. sadaqah is a kind of charity in the forms of money, any valuable assets or, in a broader sense, any good deeds done for the sake of God. In the case of money it is to be spent for the poor, the needy or the like. It is rather different from alms-giving or poor due (zakāt). For, the former is a voluntary act whereas the latter is mandatory.

47. AY, p. 122; AU, p. 39-40.

48. Sha3, p. 185; Sar1, X, p. 79; Kas, VII, p. 111; and Qud, VIII, pp. 509-11.

49. Maw, p. 144; Kha, p. 246.

50. Qur, p. 112.

51. AY, p. 112.

52. Ibid.

53. Sha3, p. 189; AU, p. 43.

54. AY, p. 122; Sha3, p. 190-91; and AU, pp. 42-44.

55. AU, pp. 44-5.

56. Kas, pp. 111-12.

57. Ibid.
58. AY, pp. 143-44.
59. In the law of contract, both Western and Islamic, notwithstanding the fact that the rules and regulations are there, the contracting parties, at times, due to the practical nature and urgency of the deals, by virtue of their free will and mutual interests, set aside the existing and prevailing rules. Consequently, the result of their negotiations, so to speak, becomes their law in respect of binding on them. This practice is acceptable to the Islamic law of contract so long as those agreements do not go against the general principles of contract in Islam. See Sch, p. 144.
60. See for instance, Jas, III, pp. 100, 103.
61. Q., 2:256.
62. For detailed discussion see, Zay, pp. 146-47.
63. Q., 16:125; cf., 10:99-100.
64. Banū Taghlīb b. Wā'il are Arabs descended from Rabī'ah b. Nazār. They converted to Christianity in the times of jāhiliyyah (pre-Islamic times). See Qud, VIII, p. 513.
65. There is a conflicting report both in Bal, and AU, as to the name of the person who approached 'Umar I. Both are not certain whether Nu'mān b. Zar'ah or Zar'ah b. Nu'mān. But AY, seems to be quite certain that the man was 'Ubādah b. Nu'mān as we quoted above. See AY, p. 120; but cf. AU, p. 32; Bal, pp. 181-82.
66. AY, p. 120; Yah, pp. 66-7; and Qud, p. 513.
67. Qud, p. 513.
68. Mal1, II, p. 42.
69. Qud, op. cit.
70. AU, p. 483; Qud, op. cit.; see also Zay, p. 149.
71. AY, p. 120.
72. Tab1, p. 212.



73. On the authority of Ibn 'Abbās the Prophet is reported to have said: "Laysa 'alā Muslim jizyah". See Daw, III, pp. 231-32; AU, p. 49; Sar1, X, p. 81; and Kas, VII, p. 112.
74. Kas, op. cit.
75. Tab1, p. 212; Zay, p. 150.
76. Sha3, VI, p. 198; Tab1, p. 212.
77. Q., 8: 38.
78. Qud, VIII, pp. 511-12.
79. Daw, pp. 231-32.
80. AU, p. 49; I, pp. 284-85.
81. al-Qarāfī, al-Furūq, III, Cairo, n.d., p. 110.
82. Kas, p. 112; Zay, p. 151.
83. It should be noted here that conceptually, in Islamic law lapse of time does not make any right or obligation by any of the parties lapse. For, Islamic law does not recognize lapse of time, or what is known in the West as "estoppel", as an element of gaining or loosing any right from the individual concerned. If an obligation emanates from a proper contract, it should be settled by specific performance or the like. See Zay, p. 152, n. 1.
84. Sar1, p. 82; Kas, p. 112.
85. Sar1, op. cit.; Kas, op. cit.
86. Kas, op. cit.
87. Qud, p. 512.
88. For detailed discussion see Zay, pp. 153-54.
89. AY, p. 139.
90. Ibid.; Bal, p. 139; see also Arn, p. 56.
91. Bal, pp. 200-01. See English translation by Hitty, I, New York, 1916, pp. 316-17; Tab3, IV, pp. 162-63.
92. tab3, III, pp. 343-44. The treaty is quoted by Arn, p. 55.
93. Sha3, p. 276.

94. Tab3, IV, pp. 155-56.
95. Ibid., pp. 155-57.
96. Bal, pp. 159-60.
97. For detailed discussion with examples from the Turkish rule see Arn, p. 56.
98. Zay, pp. 156-57.
99. To mention a few, Dennett, Conversion and the Poll Tax in Early Islam, p. 9; Sch, p. 131; C.H. Becker, "Djizya" in EI<sup>1</sup>; and CL. Cahen, "Djizya" in EI<sup>2</sup>.
100. David M. Walker, The Oxford Companion to Law, Oxford, 1980, p. 966.
101. Ibid., p. 1208.
102. Arn, p. 55.
103. Tab3, pp. 343-44 quoted and trans. by Arn, p. 55.
104. khd, p. 185.
105. Ibid., p. 189.
106. For detailed discussion see Khd, pp. 108-90.
107. Tab3, II, pp. 151-52; al-Zuhaylī, Āthār al-Harb fī al-fiqh al-Islāmī, Damascus, 1983, pp. 693-94; Dennett, op.cit., p. 15, 119; Khd, p. 189.
108. Ish, pp. 231-33.
109. Ibid., p. 504.
110. See p 46 supra.
111. al-Zuhaylī, op.cit., pp. 105, 694, 729.
112. Ibid., p. 105.
113. Sha3, IV, p. 199; Qud, X, p. 520; and al-Zuhaylī, op.cit., p. 105.
114. Sha3, p. 119.
115. With the exception of the newly established Islamic Republic of Iran.
116. A tax imposed by the government, which is not based on the Islamic law of taxation, through its various acts of parliament.
117. Zay, pp. 157-58; A. Mutawallī, Mabādī' Nizām al-Hukm fī al-Islām, 3rd., ed., Alexandria, 1977, p.

400.

118. AY, pp. 72-3. Translation is quoted from Khd, pp. 179-80; similar translation is also available in Hitti, The Origins of the Islamic State, being a translation of Bal, New York, 1916, pp. 100-01; for a French translation see M. Ḥamīdullāh, Documents sur la diplomatie Musulmane, Paris, 1935, pp. 47-8 (Corpus).
119. AY, pp. 143-44. Translation is quoted from Khd, pp. 183-84.
120. Bal, p. 140.
121. Tab3, III, p. 609. Translation is quoted from Khd, p. 214; cf., Bal, p. 140. It is noted that both Balādhurī and Ṭabarī gave different accounts as to the year this treaty was signed; the former says that it was signed in 17 A.H., whereas the latter says that it was in the year 15. Perhaps this different accounts could be resolved by saying that the treaty was originally drafted by Khālīd b. al-Walīd in 15 A.H. and then confirmed by ‘Umar I in the year 17 A.H.
122. Khd, p. 215.
123. Ibid., p. 220.
124. See for example, the Qur’ān, 3: 76; 5: 1; 6: 152; 13: 20; 16: 91; and 17: 34.

## II. KHARĀJ

1. The term kharāj or kharj is derived from Arabic root kh-r-j. It means something (certain amount) that people pay (from their property) each year. See Man, II, pp. 251-52; Lan, I, p. 719. As for the origin of the term see different views in Hossein Modarressi Tabātabā’ī, Kharāj in Islamic law, London, 1983, p. 2.
2. See Q., 18: 94; 23: 72.



3. Maw, p. 146; Far, p. 162.
4. There are some related terms to kharāj such as ghanimah, fay', and 'ushr. Suffice it to say here that ghanimah (booty) is anything confiscated from the warring parties by the Muslims through the act of war. One-fifth of ghanimah goes to the state; the rest is to be divided among the combatants in accordance with the modes of their participation. See Qur, VIII, pp. 1-2. Fay' (spoils of war) however, is another form of booty, so to speak, but has been reached to the hands of the Muslims not by means of war, i.e. either non-Muslims had fled away or by peaceful settlement. The fay' is to be divided according to its rule. See Q., 59:6-10. For the differences between the terms see San, V, p. 310 (tr. no. 9715). As for 'ushr (tithe) it is a kind of land tax levied on the products of 'ushr land. Thus, it is a zakāt proper in the case of a Muslim. If a non-Muslim uses the commodities for trade, it is considered as commercial tax when it meets specific requirements as will be seen. 'Ushr is to be spent according to the rule of zakāt (Q., 9:60).
5. See CL. Cahen, "Kharāj" in EI<sup>2</sup>.
6. Perhaps this category of land could be equivalent to the concept of "eminent domain" in the Western law of property.
7. Yah, pp. 21-2. For English translation see B. Shemesh, Taxation in Islam, I, pp. 26-7.
8. Ibn al-Athīr, al-Kāmil fī al-Tārīkh, I, Beirut, 1980, p. 268. But cf., Tab3, II, pp. 150-51.
9. Diyā'uddīn al-Rays, al-Kharāj wa al-Nuzūm al-Māliyyah li al-Dawlah al-Islāmiyyah, Cairo, 1961, pp. 46-7.
10. Sawād literally means blackness. It refers to the fertility of the land and density of its trees.

See Man, III, p. 225; Lan, I, p. 1462.

11. He was 'Uthmān b. Ḥunayf b. Wāhib b. al-'Ukaym b. al-Ḥarth b. Majda'ah al-Anṣārī from Banī 'Amr b. 'Awf b. Mālīk b. al-'Aws. He was a brother of Sahl b. Ḥunayf and known as Abū 'Amr or Abū 'Abd Allāh. The Companions of the Prophet unanimously agreed that 'Uthmān was capable of the task of surveying the lands, taxing kharāj and jizyah on the inhabitants. It was for this reason that 'Umar I appointed him together with Ḥudhayfah b. al-Yamān to the aforesaid task. He was then appointed as governor of Baṣrah. He lived in Kūfah and died there in the reign of Mu'āwiyah in the year 41/661. See Ibn al-Athīr, 'Uṣd al-Ghābah, III, Cairo, 1358/1939, p. 89; Ibn Ḥajar, al-Iṣābah fī Tamyīz al-Ṣaḥābah, II, Cairo, 1358/1939, p. 452; idem, Tahdhīb al-Tahdhīb, VII, Hyderabad, 1326 A.H., pp. 112-13; and Ibn Ḥibbān al-Bustī, Kitāb Mashāhīr 'Ulamā' al-Amṣār, ed. M. Fleischhammer under the series of "Bibliotheca Islamica", Wiesbaden, 1959, p. 26.
12. For more details see AY, pp. 24-6; English translation is quoted, with some alteration, from B. Shemesh, Taxation in Islam, III, pp. 79-80; and Jas, III, pp. 529-30.
13. See note 12 supra.
14. Ibid.
15. AU, p. 59; cf., Shw, VIII, p. 13.
16. This means that Egypt was conquered by force ('anwatan).
17. AU, p. 60.
18. This should not be understood as Islam abhors the rich. In fact, some Companions of the Prophet were rich such as Abū Bakr, 'Uthmān, 'Abd al-Raḥmān b. 'Awf, etc.
19. Q., 59: 7.

20. AU, p. 61.
21. AY, p. 141.
22. See for instance, Q., 13:2; 22:65; 31:20; 43:13; and 45:13. As for the concept of istikhlāf see Q., 2:30; 6:133; 7:129; and 24:55.
23. AU, p. 58.
24. AY, p. 27.
25. Cf., Schacht, The Origins of Muhammadan Jurisprudence, London, 1979, pp. 82-95; Sch. pp. 30. 60-61, 64, 67, and 114.
26. See note 12 supra.
27. It was reported that the Prophet divided the properties of Banū Qurayzah, Banū al-Naḍīr and Khaybar amongst al-ghānimīn (the combatants), see for instance, Daw, III, pp. 213-15, 216-17; AU, pp. 61-2; Haz, VII, p. 343; and Shw, VIII, pp. 12-3.
28. For detailed discussion see Ṣubḥī Maḥmaṣṣānī, The Philosophy of Jurisprudence in Islam, trans. Farhat Ziadeh, Leiden, 1961, pp. 88-9; Muḥammad Sallām Madkūr, al-Madkhal li al-Fiqh al-Islamī, Cairo, 1963, pp. 264-67.
29. Taṣarruf al-imām ‘alā al-ra‘iyyah manūṭ bi al-maṣlahah, See Ibn Najīm, al-Ashbāh wa al-Naḍā’ir, Cairo, 1968, p. 123; Suy, pp. 134-35.
30. Abū Ḥāmid al-Ghazālī, al-Mustaṣfā, I, Cairo, n.d., p. 142.
31. Ibid., pp. 141-42; al-Shāṭibī, al-Muwāfaqāt., I, Cairo, n.d., pp. 39-41.
32. al-Shāṭibī, al-I‘tiṣām, II, ed. Muḥammad Rashīd Riḍā, 1913-14, pp. 295-96.
33. Qarī, I, p. 419; Wahbah al-Zuhaylī, al-Waṣīṭ, Damascus, 1969, p. 556.
34. Qayī, I, pp. 101-07; cf., A.N. Poliak, "Classification of Lands in the Islamic Law and its Technical Terms", The American Journal of



- Semitic Languages, 54 (1940), 49-62.
35. For the concept of ihyā' al-mawāt (revival of dead land) in modern work see Ziaul Haque, Landlord and Peasant in Early Islam, Islamabad, 1977, pp. 248-54. This is in addition to most classical works in major schools of Islamic law; Y. Linant de Bellefonds, "Ihyā'", in EI<sup>2</sup>.
  36. Qay1, p. 101; cf., Maw, p. 147; Far, pp. 162-63.
  37. Qay1, 102.
  38. Maw, p. 147; Far, p. 163.
  39. Qay1, p 102.
  40. This is the view of Shāfi'ī, see Maw, p. 147.
  41. Ibid., cf. Sar2, V, pp. 2181-82.
  42. Cf., AU, p. 57.
  43. Qay1, p. 103.
  44. Maw, p. 147; Far, p. 164; and Qay1, p. 105.
  45. Qay1, p. 106.
  46. Ibid., pp. 106-07.
  47. As for the measure and quantity of jarīb and qafīz see Man, I, p. 260; Lan, I, p. 403. According to Rays one jarīb is equal to 1366.0416 square metres. It is about 3.07 jarīb for one Egyptian faddān (acre). See Rays, op.cit., pp. 299-300. As for qafīz see pp. 330-32.
  48. Maw, p. 148; Sar1, X, p. 79; and Kas, II, p. 62.
  49. Kas, II, p. 63.
  50. Ibid.
  51. Maw, p. 148; Qay1, pp. 113-14.
  52. Kas, II, pp. 62-3.
  53. Maw, p. 148; Far, p. 167.
  54. AY, p. 84.
  55. AU, p. 73.
  56. Maw, p. 151; Far, p. 171.
  57. AU, p. 73.
  58. Abū Yūsuf, al-Radd 'alā Siyar al-Awzā'ī, ed. Abū al-Wafā al-Afghānī, Hyderabad, n.d., pp. 90-91;

- Sar1, p. 83.
59. Tab1, p. 226.
60. Qay1, p. 137.
61. Ibid.
62. Yah, p. 167; AU, pp. 88-9; and Qay1, p. 137.
63. Yah, p. 167; cf., AU, p. 88.
64. Yah, pp. 167-68; cf., AU, pp. 88-9; and Man, p. 147.
65. Tab1, p. 226; Yah, pp. 167-68; and AU, pp. 88-9.
66. Tab1, pp. 226-27.
67. It is because of this incident that Abū Ḥanīfah and his Companions reached their view.
68. Au p. 89. The Tradition is narrated by Abū Dā'ūd, al-Nasā'ī, and al-Tirmidhī on the authority of Sa'īd b. Zayd. See editor's note 3.
69. Ibid.
70. See note 4 *supra*.
71. Detailed discussion as to the difference between the poor and the needy, see Tab2, XIV, pp. 305-10; Qur, VIII, pp. 168-71.
72. A special portion of the alms was allotted to the people of Mecca, the former enemies of the Prophet, who were converted en masse after the capture of the City, and whose "hearts were to be reconciled". This portion, however, was eventually dropped by 'Umar I after Islam had gained its momentum. See Qur, VIII, p. 181; M, Pickthall, The Meaning of the Glorious Qur'ān, Mecca, 1977, p. 187.
73. Q., 9:60.
74. AY, pp. 186-87; Jas, III, p. 527; Maw, pp. 194-95; and Kas, II, 59? .
75. Raj, p. 114.
76. Ibid.
77. Yah, p. 22; Bal, pp. 429-30; and Raj, pp. 73-4.
78. In this case, a lease holder enjoys the lease for

an unspecified periods of time. Thus, it is a free hold property according to the Western concept of property.

### III. ‘USHR (TITHE)

1. AY, pp. 132-33.
2. Ibid.; Sar1, II, p. 199.
3. AY, p. 134; Sar1, II, p. 199.
4. AY, p. 133.
5. Ibid.
6. Ibid.; Qud, VIII, pp. 518-19.
7. al-Shaybānī, Kitāb al-Hujjah ‘alā Ahl al-Madīnah, III, Beirut, 1983, pp. 550-52; AU, pp. 477-78.
8. AY, p. 133.
9. AU, pp. 471-72; Grohmann, "‘Ushr", in EI<sup>1</sup>.
10. AY, p. 134; Qay1, I, p. 156.
11. AU, p. 476.
12. AY, p. 135; AU, p. 471; and Sar1, II, p. 199.
13. AY, p. 135; AU, p. 474.
14. AU, op.cit.
15. Kas, II, p. 35; Qud, VIII, p. 518.
16. AU, pp. 473-74.
17. Ibid.
18. Ibid., p. 473.
19. Mal2, p. 134; AU, p. 476.
20. Kas, II, p. 37; Zay, p. 181.
21. Zay, p. 181.
22. Qar2, p. 38.
23. Zay, p. 181.
24. Ibid., pp. 181-82; Qar2, pp. 38-9.
25. Qar2, p. 39.
26. Ibid.
27. Mal2, p. 133; AU, p. 475; and Qay1, I, pp. 155-56.



IV. OBSERVANCE OF SOME ASPECTS OF ISLAMIC LAW

1. Sar2, I, p. 306; Sar1, X, p. 84; and Qud, VIII, p. 500.
2. Jas, II, p. 436; Kas, V, p. 143.
3. Kas, VII, p. 100; Zay, p. 95.
4. AY, p. 72; Ham, p. 331.
5. Jas, II, p. 436; Qar2, p. 40.
6. Q., 5:49; see also 5:47.
7. Haz, IX, p. 425.
8. Q., 5:42-44, 47.
9. Jas, p. 436; Ram, pp. 153-54.
10. Jas, p. 435; Qur, VI, p. 186; and Ibn Sallāmah Abī al-Naṣr, al-Nāsikh wa al-Mansūkh, Cairo, 1316 A.H., pp. 151-52.
11. Jas, pp. 434-35; Haz, IX, p. 425.
12. Ram, p. 160; see also Choucri Cardahi, "Conflict of law", in Majid Khaddūrī and Herbert J. Liebesny (eds.), Law in the Middle East, Washington D.C., 1955, pp. 334-40.
13. Kas, VII, pp. 100, 111.
14. Zay, pp. 619-20.
15. Ibid.
16. Qud, VIII, p. 532; Tay1, pp. 3-4.
17. AU, pp. 174-75; San, V, pp. 237, 307-08; Tal, pp. 179-81; Tay1, p. 3; and Qalqashandī, Ṣubḥ al-Aʿshā, XIII, Cairo, n.d., p. 365.
18. AU, pp. 174-75; Qud, VIII, p. 254; and Kha, pp. 158-59.
19. Tay1, p. 62.
20. Qud, p. 533; Qur, VIII, p. 113.
21. Kas, p. 113.
22. Qar2, pp. 41-2.
23. For details see Kas, pp. 113-14, 133.

NOTESCHAPTER THREE

1. Arj, I, p. 6.
2. Abul Muḥsin Mohm. Sharfuddin, "Tolerance in Islam", The Voice of Islam, XX, (1972), pp. 582-583.
3. Khr, p. 95.
4. Q., 17: 70.
5. Q., 2: 30.
6. Haj, III, pp. 179-80; cf., Mal2, p. 114; Daw, III, pp. 276-77.
7. Mal2, pp. 198-99; Tab3, III, pp. 226-27.
8. See for instance the Qur'ān, 7: 35; 17: 70; and 19: 58. In the tradition, the Prophet is reported to have said: "Every one of you is the descendent of Ādam and Ādam was created from the clay (al-turāb). See Ahm, II, 261, 525.
9. Arj, p. 140; Gai Eaton, Islam and the Destiny of Man, London, 1985, pp. 181-82.
10. Q., 49: 13.
11. Q., 51: 56.
12. the Qur'ān says: "For each We have appointed a divine law and a traced out way. Had Allāh willed He could have made you one community (5: 48).
13. Arj, I, p. 215.
14. Ibid., pp. 214-15.
15. Q., 2: 130-33.
16. Arj, p. 218.
17. Q., 2: 136.
18. Q., 5: 3; see also 33: 40.
19. It has become a name of a voluntary fasting day on the tenth day of Muḥarram (the first month of the Muslim lunar calendar) for the Muslims. It also the day of mourning sacred to the Shī'ite; the

- anniversary of Ḥusayn's martyrdom at Karbalā' on the 10th. of Muḥarram A.H. 60. See Mal2, p. 144.
20. Mal2, p. 144; San, IV, pp. 288-90; and Arj, p. 238.
  21. Tīr, X, pp. 301-02; Arj, p. 240; cf. Q., 33: 40.
  22. Q., 22: 69.
  23. Q., 5: 8.
  24. Haj, III, pp. 357-61, V, pp. 100-01; cf., Mal2, p. 509.
  25. Q., 2: 256.
  26. Qar2, p. 43.
  27. Ibid.
  28. Ibid.
  29. Ibid.
  30. Ibid. pp. 43-4.
  31. Ibid. p. 44.
  32. Ibid.
  33. Q., 2: 221.
  34. Q., 5: 5.
  35. Ṣafīyyah bt. Ḥuyay. It appears that she had embraced Islam prior to the marriage. For details see Ish, pp. 511, 514-15; His, III, p. 217.
  36. Sha3, IV, pp. 285, 289; Jas, I, pp. 392-93; Haz, IX, p. 445; Kas, II, p. 270; and Qud, IV, pp. 589-90.
  37. Q., 2: 221.
  38. Haz, p. 445; Kas, pp. 270-71; and Qud, p. 590.
  39. Qud, p. 590; Qay1, II, p. 421.
  40. See Jas, II, p. 326; Bad, p. 62.
  41. Haz, pp. 448-49; Qud, p. 591.
  42. Haz, op.cit.; Qud, op.cit.
  43. Q., 6: 156.
  44. Kas, p. 271; cf., Haz, p. 448.
  45. Qud, p. 591.
  46. Ibid.
  47. Kas, p. 270.



48. Y. Linant de Bellafonds, "Law", in A.J. Arberry (general ed.), Religion in the Middle East: Three Religions in Concord and Conflict, Cambridge, 1969, II, p. 432. For details see pp. 243-44 *infra*.
49. The question of what kind of animal is lawful for the Muslim's consumption is beyond the scope of this work.
50. Q., 5:5; 23:51.
51. Man, I, pp. 563-64; Lan, II, p. 1902.
52. Acts, XV:29 quoted by A. Yūsūf 'Alī in The Glorious Qur'ān, Indianapolis, 1975, p. 241, note 699.
53. Sha3, p. 289; Jas, I, p. 392; Sar2, I, p. 146; Qud, p. 589; and Qay1, I, pp. 245-46. It should be noted that the permission is given in the absence of the meat slaughtered by the Muslims. For the permission is under the rule of exception (istithnā') which should be interpreted in its strict sense.
54. Qud, p. 592. For the enumeration of the prohibited animals see the Qur'ān, 5:3, 6:145.
55. Qud, VIII, pp. 567-68; Qay1, I, p. 248.
56. Bat Ye'or, The Dhimmi: Jews and Christians under Islam, trans. David Maisel et al., Rutherford, Ne Jersey, 1985, p. 132.
57. Ibid., p. 133.
58. Arn, pp. 57-8.
59. Ibid., p. 51.
60. Ibid.
61. Ibid., pp. 50-1.
62. Ibid., p. 47.
63. Ibid.
64. Tab3, III, pp. 226-27. English translation is quoted from Arn, pp. 49-50; cf., the Prophet's advice in Abū Yūsuf, Kitāb al-Āthār, ed. Abū al-Wafā, Hyderabad-Deccan, 1355 A.H., pp. 192-93.

65. Ṭibāwī, "The Cultural Aspects with Special Reference to Egypt and Syria", in Arberry ed., op.cit., p. 545.
66. Ibid., pp. 545-46.
67. Ibid., p. 546.
68. Q., 9:60.
69. AY, p. 126.
70. Ibid., p. 125; Yah, p. 74.
71. Sha3, III, pp. 141-42; Ahm, III, p. 355; and Haj, VIII, p. 151.
72. Q., 60:8.
73. Shihāb al-Dīn al-Qarāfī, al-Furūq, III, Beirut, n.d., p. 15.
74. Kha, pp. 200-01.
75. Q., 3:64.

NOTESCHAPTER FOURI. Criminal Law

1. Q., 5: 45.
2. Awd, I, pp. 274-75.
3. Q., 21: 107, see also 34: 28.
4. Awd, p. 275.
5. Zah, p. 333.
6. Awd, p. 279.
7. Ibid., pp. 280-89.
8. Ibid., p. 280.
9. Shāṭibī defines the rights of God (ḥuqūq Allāh) as worshipping Him in the form of obedience His commandment and abstaining from what He prohibited. The rights of human being (ḥuqūq al-ʿibād) however is something to do with man's interest whether in this world or in the Hereafter, individual or collective, such as the property rights and the like. At times, these two rights are inseperable and overlapping with each other. For more details, see Shb, II, pp. 317-18.
10. Awd, p. 280.
11. Ibid., pp. 280-81.
12. Zah, pp. 338-39.
13. Kas, VII, p. 131; Awd, p. 281.
14. Kas, p. 131.
15. Ibid., p. 132.
16. Abū Yūsuf, al-Radd ʿalā Siyar al-Awzāʿī, ed. Abū al-Wafā, Hyderabad-Deccan, n.d., pp. 80-3; Daw, IV, p. 142; and Awd, p. 282.
17. Kas, p. 132; Mar, p. 23; and Awd, p. 282.
18. Kas, p. 132.
19. Cf., the opinion of Shāfiʿī in Tabī, p. 61.



20. Kas, pp. 132-33; Mar, p. 23; and Awd, p. 283.
21. Awd, pp. 284-85; Zah, p. 339.
22. Awd, p. 285.
23. Ibid.
24. Kas, p. 132.
25. Ibid.
26. Awd, p. 286.
27. Kas, p. 133.
28. Awd, p. 286.
29. Qud, X, p. 439; Awd, p. 287.
30. Kas, p. 132; Zah, pp. 336-38.
31. Kas, p. 132; Awd, pp. 287-88.
32. Tab1, pp. 59-60; Awd, pp. 287-88.
33. Haz, X, p. 360; Qud, VIII, p. 217.
34. Awd, p. 288.
35. Ibid.
36. Ibid.
37. Zay, pp. 221-22.
38. Ibid., pp. 212-13.
39. Ibid., p. 223.
40. Zah, pp. 342-43.
41. Ibid., pp. 343-44.
42. The Ḥanafī jurists derived this deduction from the Qur'ān, 5: 45, 47.
43. Kas, VII, p. 131; Zah, pp. 343-44.
44. Haj, III, pp. 451-52; Zah, pp. 342-43.
45. Some jurists defined the crimes as those forbidden acts that God has prescribed a punishment by ḥadd or ta'zīr. See Maw, p. 219; Far, p. 57.
46. A punishment which has been prescribed by God in the Qur'ān or sunnah. It is a fixed prescribed punishment the application of which is the right of God. See Kas, p. 33.
47. According to Kāsānī ḥudūd crimes are five: theft, adultery, drinking wine, intoxication, and false accusation of unchastity. See Kas, p. 33; cf.,

- Sch, p. 175.
48. It is a kind of punishment in most cases involved pecuniary values such as manumission, feeding the poor or fasting. Hence, it is another form of worship (‘ibādāt).
  49. Jas, I, p. 133; Man, VII, p. 76.
  50. Kas, p. 63.
  51. Maw, p. 236; Far, p. 279; and Awd, I, p. 685.
  52. Kas, p. 63
  53. Ibid., pp. 63-4; Zay, p. 216.
  54. W.M. Watt, Islam and the Integration of Society, London, 1961, p. 282.
  55. Zay, p. 224.
  56. Ibid.
  57. Ibid.
  58. It is worthy noting that the jurists used three terms interchangeably for this crime, i.e. al-hirābah (armed robbery), al-sariqah al-kubrā (the great theft), and qat‘ al-ṭarīq (highway robbery). See Awd, p. II, p. 638.
  59. Kas, pp. 91-2; Awd, p. 638. Cf., Maw, p. 62.
  60. Q., 5:33-4.
  61. San, X, pp. 106-07; Buk, XII, pp. 91-4; Mus, V, pp. 101-02; Tal, pp. 102-04; and Shw, VII, pp. 151-52.
  62. Tab2, X, pp. 251, 253; Qur, VI, pp. 148-49.
  63. Haz, XI, pp. 310-12; Awd, I, pp. 267-68.
  64. See for instance the Qur'ān, 2:194.
  65. Kas, VII, p. 91.
  66. Sar1, IX, p. 195.
  67. Zay, p. 226.
  68. Ibid., pp. 226-27.
  69. Q., 5:33-4.
  70. It is beyond the scope of this thesis to respond to the criticism of the severity of the punishment in the Islamic law.

71. Kas, p. 93; Qud, VIII, pp. 288-89, 294-95; and Kha, IV, p. 181.
72. Mal1, VI, pp. 299-300; Kas, pp. 93-4; Rus, II, p. 380; Qud, VIII, pp. 288-89; and Zay, p. 227.
73. Haz, XI, p. 319.
74. Ibid., pp. 317-18.
75. Mal1, VI, p. 299.
76. Awa, p. 11.
77. Tab2, X, p. 252; Kas, p. 91.
78. Mal1, VI, p. 299; Sha3, IV, p. 198; Tab1, p. 258; Sar1, IX, p. 195; Sar2, I, p. 306; Qud, VIII, p. 298; and Qur, VIII, p. 114.
79. Mal1, op.cit.; Sha3, op.cit.; Tab1, op.cit.; and Kas, p. 113.
80. See Sha3, IV, p. 209. For a complete translation of the text see Bernard Lewis, e.d., Islam II : Religion and Society, London, 1979, pp. 219-23.
81. Tab1, op.cit.
82. Haz, XI, pp. 304-05, 315.
83. Qud, op.cit.
84. If dhimmī's contract is cancelled, he may be expelled and thereby could become a stateless person according to the modern notion of the nationality law.
85. Tab1, p. 54.
86. Zay, p. 232.
87. The jurists called those who engaged in this activity as bughāt (s. bāghī).
88. Far, p. 54; Awd, II, p. 674.
89. Awd, p. 674. This element is equivalent, perhaps, to Anglo-American concept of mens rea along with actus reus as an essential mental element for commission of crime. See M. Walker, The Oxford Companion to Law, p. 833.
90. Awd p. 675.
91. Q., 49:9-10, see also 3:32, 132; 4:59; and 8:1.



92. Qud, p. 104.
93. Maw, p. 59; Far, p. 55.
94. Kas, p. 140.
95. Maw, p. 59; Far, p. 55.
96. As for the origins and the cause of khawārij see brief discussion by Far, p. 54.
97. Maw, p. 58; Far, p. 54; and Kas, p. 140.
98. Maw, p. 60; Far, p. 55.
99. Kas, p. 140; Qud, p. 108.
100. Kas, p. 113; Qud, p. 121.
101. Zay, p. 236.
102. Sar1, X, p. 128; Hum, IV, p. 415.
103. Qud, p. 121; Awd, p. 703.
104. Qud, op.cit.
105. The Prophet is reported to have said: "'Idra'ū al-hudūd bi al-shubuhāt." For details of the concept and its application, see Suy, pp. 136-37; Hum, IV p. 136; and Awd, I, pp. 208-09. This principle is also taken by the Anglo-American legal system to the extent that in criminal cases the burden of proof, as in Islam, is on the prosecution to establish beyond reasonable doubt in order to convict the criminal, see Walker, op.cit., p. 318.
106. Qud, p. 121; Awd, p. 703.
107. See Sar1, IX, p. 56; Kas, VII, p. 111; and Zay, p. 70.
108. Qud, p. 121.
109. Sar1, X, p. 136; Sar2, II, p. 103.
110. Art. 21, Saudis Nationality Law (nizām). See Zay, pp. 238-39.
111. Zay, p. 240.
112. Ibid.
113. In modern International law if a person is caught for such activity during war time, he is punished as war criminal. In British laws, however, the

- Official Secrets Act, 1911 creates offences for engaging in espionage. See Walker, op.cit., p. 430.
114. For the full story, see Ish, p. 545; Waq, II, pp. 797-99; and His, IV, pp. 29-30. Ibn Hishām added that shortly after this incident, the first verse of Mumtaḥinah (60:1) revealed.
  115. Sha3, p. 264.
  116. Q., 49:12.
  117. AY, pp. 189-90; Sar2, IV, p. 225.
  118. Tal, p. 194; Zay, p. 240.
  119. Sha3, pp. 264-65.
  120. Tab1, pp. 58-9; Qud, pp. 526-27.
  121. Tab1, op.cit.
  122. Sha3, IV, p. 198; Tab1, op.cit.; and Sar2, IV, pp. 225-26.
  123. Abū Yūsuf held that the dhimmī or musta'min spy should be killed. See AY, p. 190.
  124. Shw, VIII, pp. 7-8.
  125. Sha3, IV, p. 265; Sar2, I, pp. 205-06.
  126. Zay, p. 243.
  127. AY, p. 190; cf., Sha3, p. 256.
  128. Abū Ḥāmid al-Ghazālī, al-Mustaṣfā, I, Cairo, n.d., pp. 287-88; Zah, p. 35.
  129. See for instance, Qud, VII, pp. 636-37; cf., Kas, VII, p. 233; Sch, p. 181.
  130. See the Qur'ān, 5:27-31.
  131. Jas, I, p. 133; Awa, p.69. It should be noted that qisās itself is divided into two categories: qisās for homicide (fī al-nafs) and qisās for wounds or injuries (fīmā dūna al-nafs). The jurists usually refer to the former for qisās and used the term qawad for the latter. The term diyāh however is used for blood-money owed for killing; whereas arsh is used for blood-money owed for injuries. See Awa, p. 71.

132. Blood revenge. The system of private justice operating in cases of homicide and wounding in pre-Islamic Arabia. See Coulson, A History of Islamic law, Edinburgh, 1978, p. 241.
133. Cf., M. Cherif Bassiouni, "Qesas Crimes", in M. Cherif Bassiouni (ed.), The Islamic Criminal Justice System, London, 1982, p. 204.
134. Coulson, op.cit., p. 18.
135. Ibid.
136. Awa, p. 70.
137. Ibid.
138. Ibid., p. 84.
139. See the Qur'ān, 2:178; 3:159; 5:45; and 17:33. Abū Dā'ūd reported on the authority of Anas b. Mālīk that whenever the cases of qisās brought to the Prophet, he always recommends for forgiveness. See Qud, VII, p. 743; see also Awd, II, p. 157.
140. Bassiouni, op.cit., p. 205.
141. See Mall, p. 416; Qud, VII, p. 745.
142. Q., 3:104, 110, 114; 7:157; 9:71.
143. Some authorities reject using the term retaliation for qisās. Instead, they prefer to use the term "just retribution" or "equality or equivalence". Hence, making the punishment equal or appropriate to the crime. See Asa1, p. 37; Bassiouni, op.cit., p. 203.
144. Q., 2:178-79.
145. Q., 4:92; see also 4:93.
146. Jas, II, pp. 222-23; Kas, VII, p. 255.
147. Kas, p. 236; Zay, pp. 245-46.
148. For detailed discussion as to the amount and kind of diyah see Kas, pp. 253-54.
149. Ibid., pp. 255-56.
150. Ibid., pp. 251-52
151. Haz, X, p. 514.



152. Ibid.; Kas, p. 251; Qud, VII, pp. 650-51; and Awd, I, pp. 678-79.
153. Q., 17:33.
154. In the case of his heir has no legal capacity such as insane, minor, and the like. Cf., Sha3, VI, 13.
155. Or his deputies to carry out this special task.
156. See Zam, II, p. 664.
157. Sha3, VI, p.63; Kas, VII, pp. 242-43; and Qud, VII, p. 704.
158. Kas, p. 243; Qud. p. 746.
159. For details see Sha3, pp. 40-41; Qud, p. 743.
160. Sha3, op.cit.
161. Ibid., VI, p. 63; Qud, p. 704.
162. Awd, II, p. 155.
163. Ibid.
164. Sha3, p. 63.
165. Awd, p. 155; Awa, p.84.
166. Awa, op.cit.
167. Ibid.
168. Mall, VI, p.302; Sha3, VI, p.40; Haz, X, p. 347; and Qud, VII, pp. 652-53.
169. Kas, p. 236.
170. Mall, p. 300; Rus, II, p. 334; and Zur, IV, p. 192.
171. Zur, p. 192.
172. See for instance the Qur'ān, 59:20.
173. For the text of the Tradition see Sha3, p. 40; Haz, pp. 353-54; and Qud, p. 653.
174. Rus, p. 334.
175. Jas, I, p. 142; Kas, p, 237.
176. Jas, pp. 142-43.
177. Kas, pp. 237-38.
178. Ibid.
179. Jas, pp. 143-44; Zay, pp. 259-60.
180. Jas, pp. 133-34. As for the verse of the Qur'ān

see 2: 178; 5: 45; 17: 33.

181. Jas, p. 141; Shw, VII, p. 5.
182. Jas, op.cit., Shw, p. 6.
183. Jas, p. 141.
184. Ibid., pp. 141-42.
185. Ibid., p. 143.
186. Mal2, p. 412.
187. Awa, p. 79.
188. Zay, p. 259; Awa, op.cit.
189. Jas, pp. 142-43.
190. Ibid., p. 144; Haz, X, p. 351.
191. Jas, op.cit.
192. Haz, p. 356.
193. Awa, p. 80.
194. Awd, I, p. 339.
195. Ibid.
196. Kas, p. 236.
197. Sar1, X, p. 95.
198. For the application of the doctrine see Coulson,  
A History of Islamic Law, p. 172.
199. Slb, pp. 40-41.
200. Tay2, p. 153.
201. Zay, pp. 269-73.
202. Sha3, VI, p. 40; Sar2, IV, p. 109; Haz, X, p. 351;  
and Qud, VII, p. 657.
203. Kas, VII, p. 236.
204. Qud, p. 657.
205. Ibid.
206. Q., 5: 45.
207. Qud, op.cit.
208. Haz, p. 353.
209. Kas, p. 236; Qud, op.cit.
210. Zay, p. 251.
211. Ibid.
212. Sha3, p. 40.
213. Sar2, p. 109; Kas, p. 236.

214. Kas, op.cit.
215. Zay, p. 252.
216. Qud, p. 657.
217. Sha3, p. 40; Tab1, pp. 56-7.
218. Sar2, I, p. 205; Kas, p. 236.
219. Sar2, II, p. 226; Kas, V, p. 81; and Zay, p. 254.
220. See pp. 150-51 *supra*.
221. The term denotes both "adultery" and "fornication".
222. Awa, pp. 13-4; Walker, op.cit., p. 34.
223. Q., 17: 32; 25: 68-9.
224. Kas, pp. 33-4.
225. Ibid.
226. Q., 24: 2.
227. Q., 4: 15-6.
228. Jas, II, p. 105; Qur, V, p. 84.
229. Jas, op.cit.; Qur, op.cit.
230. Qur, op.cit.
231. Sar1, IX, p. 36; Qud, pp. 166-67.
232. Sar1, op.cit.; Qud, p. 157.
233. It is noted that according to Abū Yūsuf, Shāfi'ī, and Ḥanbalī jurists Islam is not a requirement for iḥṣān but Abū Ḥanīfah and Muḥammad al-Shaybānī held to the contrary. See Sar1, p. 39; Kas, pp. 37-8; and Qud, pp. 163-64.
234. Asa1, p. 104.
235. Sha2, pp. 130, 245; Kas, p. 39.
236. Haz, XI, p. 234; Qud, p. 160.
237. Qud, p. 169.
238. Haz, pp. 173-84, 232-33; Qud, .pp. 167-68.
239. Sar1, IX, pp. 44-5; Kas; p. 39; and Qud, p. 167.
240. Haz, p. 183; Qud, op.cit.
241. J.N.D. Anderson, Islamic Law in Africa, London, 1954, p. 196; Awa, pp. 12, 19.
242. Sha3, IV, p. 198; Haz, pp. 158-59; Sar2, I, 306; and Kas, p. 38.



243. For the Tradition see Mal2, p. 389; Buk, X, p. 11; Mus, VII, pp. 244-46; and Qud, pp. 164-65.
244. Mal1, VI, p. 242; Haz, p. 158; and Sar2, p. 306.
245. For the view of Abū Ḥanīfah and Muḥammad al-Shaybānī see Haz, p. 158.
246. Sar2, p. 306.
247. Sar1, p. 57; Shw, VII, p. 93.
248. Sha3, VI, p. 150.
249. Zay, p. 309.
250. Sar2, p. 306; Sar1, pp. 55-6.
251. Sha3, IV, p. 209; Qud, pp. 268-69; and Shw, p. 93.
252. Tab1, pp. 54-5; Sar1, pp. 55-6.
253. Sar2, p. 305; Sar1, p. 56.
254. Shw, p. 93.
255. Zay, p. 311.
256. AY, p. 189; Qud, p. 181.
257. Mal2, p. 392.
258. Qud, pp. 186, 210-11; Qay1, II, p. 790.
259. Qay1, pp. 791-92. Cf. Au, pp. 175-76.
260. Sha3, IV, p. 209. Cf. Sha3, III, p. 264.
261. Qud, pp. 525-26; Qay1, p. 791.
262. Qud, p. 526.
263. See for instance Mal2, supra; Haz, VIII, p. 331; Qud, pp. 210-11; and Awd, II, pp. 364-65.
264. Qud, p. 187.
265. Q., 7: 80-2, 84; see also 11: 77-83; 15: 58-76; 21: 71, 74-5; 26: 160-74; 27: 54-8; and 29: 28-35.
266. Mal2, p. 391; Qud, pp. 187-88; and Tay2, pp. 134-35.
267. Mar, p. 224; Far, p. 264; and Qud, p. 188.
268. Haz, XI, p. 385, Kas, p. 34; and Awd, II p. 353.
269. Qud, p. 189.
270. Haz, p. 392; Qud, op.cit.
271. Except the other view of Aḥmad b. Ḥanbal who says that it is like liwāt. According to Māwardī and

- Farrā' it is like a zinā. See Maw, p. 224; Far, p. 264.
272. Haz, pp. 387-88; Qud, pp. 189-90; and Awd, pp. 355-56.
273. Kas, p. 34.
274. Maw, p. 224; Far, p. 264.
275. See pp. 194-95 supra.
276. Cf. Shw, pp. 117-18.
277. See p. 151 supra.
278. Awa, pp. 17-8.
279. See Sch, p. 187.
280. Kas, p. 40; Qud, p. 215.
281. Q., 24; 4-5.
282. Jas, III, p. 267; Qur, XII, p. 172.
283. Sha1, II, p. 135; Far, p. 270; Kas, p. 63; and Rus, II, p. 443.
284. Jas, p. 267; Qud, p. 215.
285. Maw, p. 229; Qud, p. 216.
286. Haz, p. 268.
287. Q., 24:23. See the relevant interpretation of the verse by Kas, pp. 40-1.
288. Sar1, IX, p. 118; Kas, p. 41.
289. E.g. 'O son of whore' or 'O sinner' and the like.
290. Sar1, p. 119; Maw, p. 230.
291. This process occurs when the husband affirms under oath that the wife has committed a zinā or that the child born or to be born of her is not his (son), and she, affirms under oath to the contrary. Hence, the marriage is dissolved. See Q., 24: 6-9.
292. Awd, II, p. 455.
293. Sar1, p. 118; Maw, p. 230; Far, p. 270; and Rus, II, p. 440.
294. Haz, p. 274.
295. See pp. 204-05 supra.
296. Haz, p. 275.

297. Qud, p. 216; Hum, V, p. 346.
298. See Mal1, VI, p. 221.
299. Far, p. 270; Hum, p. 346.
300. See pp. 150-51 supra.
301. Jas, II, pp. 492-93; Sar2, I, p. 338.
302. Hum, p. 338.
303. Ibid., pp. 338-39.
304. Zay, p. 318.
305. Ibid.
306. Mal2, p. 222; Tab1, p. 55; Far, p. 270; and Sar1, IX, p. 56.
307. Maw, p. 230; Sar1, p. 118; Kas, p. 64; and Qud, pp. 216, 228.
308. Qud, p. 216. Cf. Mal2, p. 221.
309. Zay, p. 322.
310. Ibid., p. 322.
311. Kas, p. 65; Qud, p. 240.
312. Q:, 5:38.
313. Qud, p. 240.
314. For taking someone else's property unlawfully by different means see Kas, p. 65.
315. Kas, p. 77.
316. Maw, p. 226; Far, p. 266.
317. It is noted that Shāfi'ī school held that one dinār was consisted of twelve dirhams in the time of the Prophet. See Sha3, VI, p. 140; Tay2, p. 128.
318. Mal2, p. 393; Sha3, p. 140; Qud, pp. 242-43.
319. Maw2, p. 226; Haz, pp. 351-52; Kas, p. 77; Qud, p. 242.
320. Ibn Qayyim says that three dirham was sufficient for the daily maintenance of an average man at that time. See Qay2, II, p. 64.
321. Mal2, p. 393; Tay2, pp. 127-28.
322. For a full account of mediation by Usāmah see, Rus, pp. 445-46; Qud, p. 241.



323. Kas, p. 77.
324. Haz, p. 352; Awa, p. 4.
325. Awa, p. 4.
326. Asa1, pp. 149-50; Awa, p. 138.
327. Maw, p. 228; Kas, p. 67; and Rus, II, p. 446.
328. Qud, p. 268.
329. Zay, p. 327.
330. Qud, p. 269; Zay, p. 327.
331. Kha, IV, p. 175.
332. Sar1, p. 181; Kas, p. 71.
333. Zay, p. 328.
334. Mal1, p. 278; Haz, p. 334; and Kas, pp. 69-70.
335. Zay, p. 329.
336. Ibid.
337. Sar1, p. 178; Kas, p. 71; Kha, p. 175.
338. Tab1, pp. 54-5; Sar1, p. 178; and Qud, pp. 268-69.
339. Ibid.
340. Zay, p. 331.
341. See p. 215 supra.
342. Kas, p. 71; Qud, p. 268; and Kha, p. 175.
343. Kas, p. 69-70.
344. Mal1, p. 278; Haz, p. 334.
345. Zay, pp. 332-33.
346. San, X, p. 365.
347. Kha, p. 175.
348. Sar1, p. 181.
349. Qud, p. 269.
350. See p. 214 supra.
351. Zay, p. 333.

## II. Family Laws

1. It is worthy to note that most modern legislations in contemporary Muslim countries on family laws are called Qānūn al-Aḥwāl al-Shakhṣiyyah or the law of personal statutes. It is fairly recent terminology which is unknown to the classical jurists. Thus, the term is another manifestation of Western legal influence in Islamic law. See Zay, pp. 338-39; Bad, p. 88.
2. See Chapter Three pp. 122-23.
3. Jas, II, pp. 324-25. Mālik says it is not recommended. See Mal1, II, p. 306.
4. Mal1, p. 298.
5. See Q., 2:221.
6. Sha3, V, p. 7; Sha1, I, p. 189; Kas, II, pp. 271-72; Qud, VI, p. 634; and Zay, pp. 354-55.
7. Zay, p. 351; Bad, p. 88.
8. See Sch, pp. 132-33.
9. Mar, pp. 45-7.
10. Sar1, V, 38; Kas, II, p. 310; Kha, III, p. 192; and Mar, p. 45.
11. Sar1, p. 38.
12. See Q., 3:3-4; 66:11.
13. Qay1, I, pp. 308-09.
14. Mal1, II, p. 311; Qud, VI, p. 613; and Kha, III, p. 196.
15. Mar, p. 45.
16. Sar1, p. 38.
17. Q., 5:49.
18. Sar1, V, p. 45.
19. Mar, p. 46.
20. Kas, p. 310.
21. Sar1, p. 38; Kas, p. 311; and Mar, p. 46.
22. Sar1, op.cit.; Kas, op.cit.
23. Sar1, pp. 38-9.

24. Ibid.
25. The non-marriageable persons, i.e. one's female ascendants and descendants. For detail see Sch, pp. 162-63.
26. Sar1, p. 39; Mar, p. 47.
27. Qud, VIII, pp. 214-15.
28. Case no. 1416/56 delivered on 18/11/1956.
29. Ihāb Ḥasan Ismā'īl, Sharḥ Mabādī' al-Aḥwāl al-Shakḥsiyyah li al-Tawā'if al-Milliyyah. Cairo, 1957, p. 121; quoted by Zay, p. 357.
30. Kas, II, p. 272.
31. Sar1, V, p. 44.
32. Zay, p. 367.
33. Ibid., p. 371.
34. Rus, II, p. 48; Qud, VI, p. 613.
35. Qud, op.cit.
36. Rus, II, pp. 40-1; Qud, VI, pp. 620-23; and Kha, III, pp. 196-97.
37. Mal2, pp. 250-51; Qud, pp. 626-27; and Qay, I, p. 309.
38. Sha3, IV, pp. 190-91; Qud, pp. 267-68; and Kha, p. 197.
39. Mal1, II, p. 298.
40. Ibid., p. 303.
41. Ibid., p. 298; Zur, III, pp. 158-59.
42. Sh1, p. 64.
43. Rus, p. 49; Qay, I, pp. 324-25.
44. Qud, VI, pp. 616-17.
45. Rus, p. 49; Qud, p. 616.
46. Kas, p. 336; Mar, p. 57.
47. Hum, III, pp. 418-19.
48. Sar1, V, pp. 45-7; Kas, p. 336.
49. It is noted that the jurists usually relate the separation with the consummation as a demarcation point in order to preserve and determine the progeny, and hence relate it to its father.



50. Sha3, V, pp. 48; 52-53; Qud, VI, pp. 615-16; and Kha, III, p. 191.
51. Qud, p. 616.
52. Qud, op.cit.; Kha, op.cit.
53. Haz, VII, pp. 312-13; Shw, VI, pp. 307-08.
54. Haz, p. 313.
55. Qay4, III, p. 15.
56. Ibid.
57. Ibid., p. 14; Qay1, I, p. 324.
58. Qay4, p. 15.
59. Q., 60:10
60. Ibid.
61. Zay, p. 414; Bad, p. 103.
62. Mal1, II, pp. 300-01; Jas, p. 438; Sar1, V, pp. 50-1; and Qud, VI, pp. 619-20.
63. Sha3, V, pp. 47-8; Qud, pp. 619-20.
64. Sar1, pp. 50-1; Kas, II, p. 338-39.
65. Zam, IV, p. 518.
66. Q., 60:10.
67. Sha3, V, pp. 47-8; Qur, XVIII, pp. 63-4. Cf., Zam, p. 518.
68. According to Ibn Qayyim the duration between the two conversions was more than eighteen years. See Qay4, p. 14.
69. Haz, VII, p. 315; Kas, p. 338.
70. Mal2, pp. 252-53; Sha3, IV, pp. 287-88; and Qud, pp. 619-20.
71. Sha3, V, pp. 47-8; Kas, p. 338; and Zay, p. 424.
72. Qud, p. 620; Bad, p. 109.
73. Q., 60:10.
74. Jas, III, p. 438.
75. Ibid.
76. Ibid.
77. Qur, pp. 63-4.
78. Hum, III, p. 424; Zay, p. 426; and Bad, p. 113.
79. Qud, pp. 619-20; Bad, op.cit.

80. Cf., Zay, pp. 429-30; Bad, p. 116.
81. Zay, p. 429.
82. Q., 65:6.
83. Q., 65:7.
84. Q., 2:223.
85. Zay, p. 465; Bad, p. 136.
86. Sha3, V, pp. 93-4; Sar1, V, p. 181; Hum, IV, p. 379; and Haj, IX, p. 507.
87. Sar1, p. 181; Haj, p. 513.
88. Hum, p. 378.
89. Kas, III, p. 209; Qud, VII, p. 606; Kha, III, pp. 401-02.
90. Sha3, p. 97; Kas, p. 210; and Bad, p. 137.
91. Sha3, p. 97; Kha, pp. 195-96.
92. Qud, VI, p. 637; Zay, p. 466.
93. Sar1, V, p. 200; Kas, IV, p. 22.
94. Sar1, p. 205.
95. For detailed discussion over the issue. See Kas, IV, p. 22; Mar, pp. 64-5.
96. Sar1, p. 200; Qud, VI, p. 618.
97. Hum, IV, p. 408.
98. In Shāfi'ī school this refers to his view before he left Iraq whereas jadīd is his new ijtihād especially after he took up residence in Egypt. See Sha1, p. 7.
99. Kha, III, p. 201; Bad, p. 138.
100. Sar1, p. 201; Qud, p. 618.
101. Kha, p. 201; Bad, pp. 139-40.
102. Bad, pp. 139-41.
103. Jas, II, p. 101; Haz, IX, p. 304; Rus, II, p. 352; Qud, VI, p. 294; and Shw, VI, p. 192.
104. Q., 4:141.
105. Bad, p. 232.
106. Mal2, p. 241; San, X, pp. 248, 280; and Shw, pp. 192-93.
107. Mal2, op.cit.

108. Haz, IX, p. 304; Rus, pp. 352-53; Qud, pp. 294-95; and Kha, p. III, p. 24.
109. Sha3, IV, p. 77; Haz, p. 304; Rus, p. 353; and Qud, p. 294.
110. He was appointed by the Prophet as a governor of Yemen. See AY, p. 364; Shi, pp. 14-5.
111. Sha3, p. 77; Jas, pp. 101-02; and Rus, p. 353.
112. See Daw, III, p. 303.
113. Jas, pp. 101-02; Shw, pp. 193-94.
114. In another Tradition Ja'far was also excluded from it. See Shw, pp. 192-93.
115. Mal2, p. 241; Bad, pp. 234-35.
116. Jas, II, p. 104.
117. Qud, VI, pp. 298-99.
118. Ibid.; Zay, p. 536.
119. Qud, p. 299.
120. Q., 4: 12.
121. Jas, II, p. 105.
122. Qud, p. 300; Bad, p. 240.
123. San, X, p. 248; Haz, IX, p. 308, and Qud, p. 299.
124. Haz, p. 308.
125. See Zay, p. 538; Bad, p. 241.
126. Kas, VI, p. 219.
127. It is a kind of sadaqah (charity), hence the rules and regulations that apply to sadaqah govern also waqf. See Seymour Vesey-Fitzgerald, Muhammadian Law An Abridgement, London, 1931, p. 207.
128. Ibid.; Qud, V, pp. 597-98.
129. Kas, pp. 219-20; Qud, p. 644.
130. Hum, VI, p. 200.
131. Ibid.
132. Ibid., Cf., Qay1, I, pp. 299-300.
133. Hum, op.cit.
134. Ibid., 200-01; Qay1, p. 299; and Bad, p. 185.
135. Qay1, p. 302; Kha, II, p. 380; and Zay, p. 486.



136. Zay, p. 485.
137. Qud, pp. 645-46; Kha, II, pp. 379-80.
138. Zay, pp. 488-89; Bad, p. 185.
139. Qud, p. 645; Kha, pp. 376-77.
140. The Hanafi jurists held that no endowment for musta'min. See p. 250 supra.
141. Qud, p. 646; Qay1, I, pp. 301-02; and Kha, pp. 379-80.
142. Qay1, op.cit.
143. Ibid., p. 302.
144. Q., 76:8-9.
145. Q., 60:8.
146. Sha1, II, p. 194; AU, p. 543; Jas, III, p. 471; and Zam, IV, p. 668.
147. Jas, p. 436.
148. For details see Zam, p. 516; Qur, XVIII, p. 59. For the tradition see San, X, p. 353.
149. Sha1, pp. 192-93.
150. San, X, pp. 353-54; AU, p. 543; Qud, p. 646; and Qay1, p. 306.
151. Jas, III, p. 436; Kha, p. 380.
152. Kha, op.cit.
153. Art. 7 Act No. 48, 1946. See Zay, p. 489; Bad, p. 188.
154. Zay, pp. 489-90; Bad, pp. 188-89.
155. Zay, p. 490.
156. The term could be used, in this context, for testimony, witness, evidence, certification, statement, etc. See Man, III, pp. 239-40; Lan, II, pp. 1610-11.
157. Jas, I, p. 494; Haz, IX, pp. 405-06; Kas, VI, p. 280; Mar, pp. 94-5; and Bad, p. 209.
158. Qay3, p. 209.
159. Rus, II, p. 462; Bad, p. 211.
160. Sar1, V, p. 23; Kas, p. 280; and Bad, p. 211.
161. Sha1, II, pp. 141-42; Sha3, VII, pp. 49-50; and

- Kha, IV, p. 427.
162. Wak, II, p. 281; Jas, II, 493; Haz, IX, pp. 405-06; and Qud, IX, p. 182.
163. Q., 2:282.
164. Q., 65:2.
165. Sha1, II, pp. 143-45; Zam, IV, p. 555.
166. Bad, p. 213.
167. Q., 5:106.
168. Jas, pp. 489-90.
169. Qur, VI, p. 345.
170. Qud, p. 184; Qay3, p. 223; and Bad, p. 215.
171. It is an alternative to formal ablution in cases where water, or certain conditions, is not available.
172. See the Qur'ān, 5:3.
173. Bad, pp. 215-16.
174. Zay, pp. 578-79; Bad, p. 224.
175. Bad, op.cit.
176. Qay3, p. 223; Zay, pp. 578-79.
177. Sar1, V, p. 32; Qay1, II, p. 415.
178. Qay1, op.cit.
179. Zay, p. 579; Bad, p. 229.
180. Q., 2:282.
181. Haz, IX, pp. 405-06; Qud, IX, p. 184; and Kha, IV, p. 427.
182. Zay, p. 581.
183. Jas, II, pp. 492-93; Kas, VI, p. 280.
184. Wak, II, p. 271; Kas, pp. 280-81.
185. Q., 8:73; see also 5:51.
186. Kas, p. 281.
187. Sar2, IV, p. 283; Kas, p. 281; Hum, VI, p. 44; and Mar, p. 98.
188. Kas, p. 281.
189. Ibid.; Hum, op.cit.
190. Zay, p. 582.

191. Ibid.

192. Ibid.

### III. The Law of Contracts and Obligations

1. See pp. 153, 232-33 *supra*.
2. See Q., 2:275-76, 278-79, 282-83; 4:161; 24:37; and 62:9.
3. Bad, p. 22; Zay, p. 547.
4. Bad, op.cit.
5. Sar2, I, p. 306; Sar1, X, p. 84; Sch, p. 132.
6. Jas, II, p. 436.
7. For instance, unjustified enrichment, gharar (risk) etc. For details see Sch, pp. 145-47.
8. See Q., 2:275; 4:161.
9. Jas, p. 436; Sar1, V, p. 38.
10. Q., 2:279.
11. Kas, V, p. 135; Mar, p. 78.
12. Kas, op.cit.
13. Ibid., VI, p. 81.
14. Ibid., VII, p. 133.
15. Zay, pp. 547-48.
16. Sar1, IX, p. 56.
17. Sha3, IV, p. 224.
18. See Qud, V, p. 566.
19. Kas, IV, p. 176.
20. Ibid., V, p. 16.
21. Ibid., VI, p. 81.
22. Ibid., VI, p. 176.
23. Qay1, II, pp. 776-78. Cf., Kas, VI, p. 61.
24. Mar, p. 19.
25. Jas, II, p. 436.
26. See AY, pp 133, 137 ; AU, pp. 52-3.
27. Jas, p. 436; Kas, II, p. 38.
28. AU, p. 52.
29. Ibid., p. 53.



30. Ibid.
31. Ibid., p. 54.
32. There are also two conflicting opinions from Ḥanbalī school. But the prevailing view says that it is permissible. This opinion was shared by Masrūq, Nakhaʿī, Mālik, Ḥanafī jurists. See Qud, VIII, pp. 520-21; Qayl, I, pp. 164-65.
33. Zay, p. 552.
34. Sha3, IV, p. 223; Kas, V, p. 143.
35. Kas, op.cit.
36. Ibid.
37. Ibid., VII, pp. 147-48.
38. Qud, V, p. 299.
39. Kas, VII, p. 147; Qud, p. 299.
40. Sha3, IV, p. 224; Kas, V, pp. 16, 113; Qud, V, p. 229.
41. Zay, p. 553.
42. For instance, in liquor factory, gambling places, an interest making institutions etc.
43. Sha3, V, p. 205; Kas, IV, p. 189; Qud, V, p. 554.
44. Cf., Barry Nicholas, An Introduction to Roman Law, Oxford, 1962, pp. 162-63, 172.
45. Qud, V, p. 554.
46. See Tir, V, pp. 215-16. See also Q., 62:10.
47. Ibid.
48. See note 23 supra. See also Fattal, Le Statut Legal Des Non-Musulmans En Pays D'Islam, Beyrouth, 1958, p. 146.
49. Sha3, IV, p. 225; Qud, V, pp. 3-4.
50. Qud, op.cit.
51. See Qud, p. 4.
52. Zay, p. 555.
53. Qud, p. 4.
54. Ibid.; Qayl, I, pp. 269-70.
55. Kas, VI, p. 20; Qud, V, pp. 87-88.
56. Qud, op.cit.

57. Ibid., p. 126.
58. Ibid.
59. Ibid.
60. Kas, VII, p. 132.
61. Ibid.
62. Kas, p. 133.
63. Ibid.; Zay, pp. 560-61.
64. Qud, VIII, p. 458; Zay, p. 561.
65. Qud, p. 482.
66. Q., 16:91; see also 2:177; and 17:34.
67. Qud, For the treaty see Tab3, II, pp. 634-35.
68. Qud, op.cit.
69. Ibid. For the Tradition see Tab3, p. 638.
70. Qud, op.cit.
71. Zay, p. 563.
72. Ibid.

NOTESCHAPTER FIVEI. Religion

1. Q., 2:256.
2. This subject should be read in conjunction with Chapter Three supra.
3. Q., 10:99.
4. Zam, II, p. 372.
5. Q., 10:100.
6. Yūsuf al-Qaraḍāwī, Non-Muslims in the Islamic Society, tr. K.M. Ḥamad and S.M. ‘Alī Shah, Indianapolis, 1985, p.9.
7. Ibid.
8. Ibid., p. 9-10.
9. See for instance, A. von Kremer, Culturgeschichte des Orients unter den Chalifen, I, Vienna, 1875, p. 183, quoted by Ram, p. 146; Arn, p. 341; and Trī, p. 100.
10. Q., 16:125.
11. Q., 11:28.
12. Zam, pp. 389-90.
13. See Catholic Research Centre, "Islamization of Malaysian Laws", Kuala Lumpur, n.d., p. 21.
14. See pp. 65-6 supra.
15. For details of the treaty see AY, p. 72; Bal, p. 72.
16. AY, pp. 73-4; Bal, pp. 73-4.
17. See Man, IV, pp. 153-55; Lan, I, p. 483. For the concept of ḥiwār see J. Leserf, in EI<sup>2</sup>. Cf., Q., 4:36; 9:6.
18. For not following the Tradition of the Prophet which is obligatory for the Muslims.
19. See for instance Q., 17:34; 23:8; 70:32.



20. See note 16 *supra*.
21. Zay, p. 95.
22. Ibid.
23. Frq, p. 46.
24. Ibid., p. 47.
25. Kas, VII, p. 132.
26. Mal2, p. 117; Mus, IV, pp. 1398-99; Baq, II, pp. 354-55.
27. Frq, p. 47.
28. Q., 35:24; 16:36.
29. Q., 14:4.
30. Frq, pp. 47-8.
31. Ibid.
32. Ibid.
33. Ibid., p. 49.
34. Ibid.
35. Q., 3:64.
36. Q., 2:62.
37. Asa1, p. 14.
38. See al-Fārūqī, "Islam", in Fārūqī and David E. Sopher (eds.), Historical Atlas of the Religions of the World, New York, 1974, p. 241.
39. Frq, pp. 49-50.
40. Ibid., p. 58; Qar2, p. 10.
41. Q., 22:39-40. See also Q., 24:36; 72:18.
42. See pp. 65-6 *supra*.
43. Tab3, III, p. 609. Cf., Bal, pp. 140-41.
44. Qay1, II, p. 669.
45. Ibid., p. 672; Kha, IV, p. 253.
46. AU, p. 96; Qay1, II, p. 673. For the prohibition of emasculation see Ahm, V, pp. 236-37.
47. AY, p. 149; AY, p. 98; and Qay1, II, p. 674.
48. Qud, VIII, p. 526; Kha, IV, p. 253.
49. Qay1, II, p. 682.
50. Ibid., p. 684.
51. Ibid.

52. Zay, p. 96.
53. Qay1, p. 687.
54. Qud, p. 527; Hum, VI, p. 58; and Qay1, p. 689.
55. Qud, p. 527; Qay1, p. 689; and Kha, p. 254.
56. Hum, p. VI, p. 58; Qay1, p. 690.
57. Qud, p. 527; Qay1, op.cit.
58. Qay1, pp. 690-91.
59. Zay, p. 96.
60. Qud, p. 527; Qay1, p. 691.
61. Qud, pp. 527-28; Hum, p. 58; Qay1, pp. 691-92; and Kha, pp. 253-54.
62. Kas, VII, p. 114; Kha, p. 253; and Mar, p. 109.
63. Kas, p. 113; Qar2, p. 20.
64. AY, p. 146.
65. Ibid., p. 147.
66. Ibid.
67. Bat Ye'or, op.cit., p. 58.
68. Ibid., p. 59.
69. Qar2, p. 20.
70. Ibid.
71. Zay, pp. 98-100.
72. Ibid., p. 100.

## II. Politics

1. Frq, p. 62.
2. Lahum mā lanā wa 'alayhim mā 'alaynā, see Kas, VII, pp. 100, 147.
3. Zay, p. 71.
4. Zay, p. 77.
5. Tay2, p. 22.
6. Mus, III, p. 1041; Haj, XIII, p. 125; and Baq, II, pp. 112-13.
7. See Tay2, pp. 18-9.
8. Mus, III, pp. 1015-16; AU, p. 11.
9. Tay2, p. 17.

10. Ibid., p. 25.
11. Q., 4:58.
12. Kha, IV, pp. 129-30.
13. Maw, p. 43; Far, p. 39.
14. Mawdūdī, Huqūq Ahl al-Dhimmah fī al-Dawlah al-Islamiyyah, Cairo, 1978, pp. 34-5; Frq, p. 62.
15. Ibn Khaldūn, Muqaddimah, Beirut, n.d., p. 191. See also Maw, p. 5.
16. For the position of jihād in Islam see San, V, pp. 253-54, 260-61.
17. Qar2, p. 23. But some jurists held that the non-Muslims could be appointed as collectors of kharāj and jizyah. See Maw, p. 166; Far, p. 140.
18. Q., 3:118. See also 60:8.
19. See Tab2, IV, pp. 63-4.
20. Muḥammad Rashīd Riḍā, Tafsīr al-Manār, IV, Beirut, n.d. pp. 83-4; Zay, p. 89.
21. See Afzal Iqbāl, Diplomacy in Islam, Lahore, 1965, pp. 83-4.
22. Ish, p. 526; His, III, p. 233; and Tab3, II, pp. 652-53.
23. See A. Iqbāl, op.cit., pp. 26-7.
24. Ish, pp. 541-42; His, IV, pp. 26-7; and Tab3, II, pp. 622-25.
25. Ish, pp. 232-33.
26. This is perhaps the equivalent of the Cabinet Minister in our time.
27. Maw, p. 31.
28. Bal, pp. 192-93; Riḍā, p. 84.
29. Ham, p. 333.
30. Ibid.
31. Bal, pp. 192-93, 294; Riḍā, p. 84; and Tr1, pp. 18-9.
32. Arn, pp. 57-8.
33. Perhaps the notion and concept of Prime Minister in those days is different from that of our time.



34. Arn, p. 57. Cf., Tr1, p. 25.
35. Tr1, p. 26.
36. Ibid.
37. Ibid., pp. 18-9.
38. Ibid., pp. 34-5.
39. Riqā, p. 84.
40. Tr1, pp. 22-4.
41. Dud, p. 295.
42. Zay, p. 82.
43. Q., 22:41.
44. Qar2, p. 23.
45. Zay, pp. 82-3.
47. Asa2, p. 19.
48. Ram, p. 145.
49. Q., 42:38. See also 3:159.
50. Dud, p. 316; Asa2, pp. 43-5. Nevertheless, he could be invited in the discussion of certain issues.
51. Maw, p. 6; Far, p. 29.
52. Zay, pp. 83-4.
53. Dud, p. 317; Ram, p. 145; and Zay, p. 84.
54. Dud, p. 317; Ram, p. 145.
55. Ish, p. 233.
56. Ibid.
57. Cf., Dud, p. 84.
58. Zay, p. 84.
59. See note 15 supra.
60. Zay, p. 84.
61. Including assembly, speech, and press.
62. Tay1, pp. 3-4; Qay1, pp. 830-31; and Zay, p. 101.

### III. Education

1. Q., 9:122.
2. al-Maqrizī, Imtāʿ al-Asmāʿ, I, Cairo, 1941, pp.

- 39, 41.
3. Q., 12: 76; 35: 19-21; 39: 9; 40: 58 and 58: 11.
  4. Dud, pp. 318-19; Zay, p. 101; and Frq, p. 60.
  5. Frq, op.cit.
  6. Ibid., p. 61.
  7. See M. Ḥamīdullāh, "Relations of Muslim and non-Muslims", Journal Institute of Muslim Minority Affairs, VII, I, January, (1986), 10.
  8. Frq, p. 60.
  9. Dud, p. 318; Frq, p. 60.
  10. Frq, op.cit.
  11. Ibid.
  12. Ibid.
  13. Ibid.
  14. Ibid.
  15. Ibid.
  16. Q., 49: 13.

#### IV. Economics

1. This section should be read in conjunction with the relevant subject in Chapter Four supra.
2. Dud, p. 319; Frq, p. 61.
3. Kas, V, p. 193.
4. Ibid.
5. AY, p. 72; AU, p. 182; Jas, II, p. 436; Bal, p. 72; Fattal, op.cit., p. 150.
6. Q., 4: 161.
7. Jas, p. 436.
8. Kas, VII, p. 113.
9. Frq, p. 62.
10. ‘Abd al-Raḥmān I Doi, Non-Muslims under Sharī‘ah (Islamic Law), London, 1983, p. 108.
11. See Tr1, p. 155.
12. Ibid.; Fattal, op.cit., p. 151.
13. Frq, p. 61.

14. Qar2, p. 22.
15. Adam Mez, The Renaissance of Islam, trans. Salahuddin Khuda Bukhsh and D.S. Margoliouth, 1 ed., London, 1937, p. 39.

## V. Social Security

1. AU, p. 271.
2. Sar1, X, p. 81; Kas, VII, p. 111; Zay, p. 102.
3. Zay, p. 102.
4. Q., 5:8.
5. See AU, pp. 10-11; Haj, II, p. 381.
6. Zay, p. 102.
7. He was Sa'īd b. al-Musayyab b. Abī Wahab al-Makhzūmī (15-94 A.H.). He was one of tābi'ī jurist in Medina and was considered as the most learned (afqah) among the Ḥijāzī jurists. Associated and learnt from the jurists of the Companions (fuqahā' al-ṣahābah). See Shi, pp. 24-5.
8. See AU, p. 543.
9. See AY, p. 114.
10. AU, p. 48. For the act of 'Umar I see AY, p. 126.
11. Zay, p. 105.
12. Sar1, II, pp. 202-03; Qar1, II, p. 705.
13. Jas, I, pp. 461-62; Kas, I, p. 49.
14. Qud, II, pp. 653-54.
15. Jas, p. 462.
16. For details see AU, 541-42.
17. Q., 9:60.
18. AY, p. 126.
19. Jas, p. 461; Kas, p. 49.
20. Zay, p. 108.
21. AU, p. 541.
22. Ibid.
23. See for instance, 2:272; 60:8-9; 76-8.
24. Lan, II, p. 2416.



25. Rus, I, p. 282.
26. Jas, I, pp. 461-62; Kas, p. 49; and Rus, p. 282.
27. AU, p. 543; Qud, III, p. 78.
28. Rus, op.cit.
29. See Q., 9:60.
30. Zay, p. 109.
31. Qar1, p. 708; Zay, p. 109.

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